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FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE BUREAU OF LAND MANAGEMENT*

M-36914

June 25, 1979

Water and Water Rights: Generally

By acquisition of the lands now comprising the Western States, the United States acquired all rights appurtenant to such lands, including water rights.

Constitutional Law: Generally—Water and Water Rights: Generally

Under the Property Clause, Congress has the power to control the disposition and use of water on, under, or appurtenant to original public domain lands, and it is not lightly inferred that this power has been exercised.

Water and Water Rights: Generally

To the extent Congress has not clearly granted authority to the States over waters which are in, on, under, or appurtenant to Federal lands comprising the public domain and reserved public domain, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of State law.

Constitutional Law: Generally—Water and Water Rights: Generally

Federal control over the disposition and use of water in, on, under or appurtenant to Federal land ultimately rests on the Supremacy Clause, which permits the Federal Government to exercise its constitutional prerogatives without regard to State law.

Water and Water Rights: Generally

The admission of a State into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over waters which are in, on, under, or appurtenant to Federal lands comprising the public domain and reserved public domain.

Water and Water Rights: Generally

Federal control over its needed water rights, unhampered by compliance with procedural and substantive State law, is supported by the Supremacy Clause and the doctrine that Federal activities are immune from State regulation unless there is specific congressional action providing for State control.

Water and Water Rights: Generally

Originally, the common law riparian rules of natural flow applied to the public lands; these riparian rules could be changed by State legislatures only if such changes did not impair the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of Government property, or if the Congress expressly consented.

Water and Water Rights: Generally

Three Federal statutes provide the general basis for State regulatory authority over water rights: Act of July 26, 1866, § 9, 14 Stat. 253; Act of July 9, 1870, § 17, 16 Stat. 218, 43 U.S.C. § 661 (1976); and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976).

Water and Water Rights: Generally

The Act of July 26, 1866, § 9, 14 Stat. 253, and the Act of July 9, 1870, § 17, 16 Stat. [illegible] 43 U.S.C. § 661 (1976), sanctioned private possessory rights to water on the public lands asserted under local laws and customs; Congress in effect waived its

*Not in chronological order.

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proprietary and riparian rights to water on the public domain to the extent water is appropriated by members of the public under State law in conformance with the grant of authority found in these two Acts, and Congress thereby confined the assertion of inchoate Federal water rights to unappropriated waters that exist at any point in time.

Water and Water Rights: Generally

Supreme Court *dicta* concerning the effect of the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976), on Federal water rights are some what at war with each other; but Supreme Court decisions upholding Federal reserved water rights must mean that the Desert Land Act of 1877 did not divest the United States of its authority, as sovereign, to use the unappropriated waters on the public lands for governmental purposes.

Water and Water Rights: Generally

Since the Federal Government has never granted away its right to make use of unappropriated waters on Federal lands, the United States retains the power to vest in itself water rights in unappropriated waters on, in, under, or appurtenant to Federal lands, and it may exercise such power independent of substantive State law.

Water and Water Rights: Federal Appropriation

The United States has the right to appropriate water on its own property for congressionally authorized uses, which right arises from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on Federal lands, but may not predate in priority the date action is taken leading to an actual use, and it may not adversely affect other rights previously established under State law.

Water and Water Rights: Federal Appropriation

The appropriation of water by the Federal Government for authorized Federal purposes cannot be strictly limited by State substantive law; for example, by what State law says is a "diversion" of water or a "beneficial use" for which water can be appropriated.

Water and Water Rights: State Laws

Since Congress has not generally directed the Federal Government to comply with State water law, such compliance is required only in those specific instances where Congress has so provided, but in the converse, Congress has not prohibited the United States from voluntarily complying with such State water laws.

Water and Water Rights: State Laws

State law should be followed to the greatest practicable extent in acquiring Federal water rights. This includes following State procedural law in all cases involving appropriation of non-reserved water rights and State substantive law where that law recognizes the Federal appropriative right in all pertinent respects.

Water and Water Rights: Federally Reserved Water Rights

When the Federal Government withdraws land from the public domain and reserves it for a Federal purpose, by implication, it reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation, and the reserved water right vests on the date of the reservation and is superior to the rights of future appropriators.

Water and Water Rights: Federally Reserved Water Rights

The intent to reserve water is inferred if previously unappropriated water is necessary to accomplish the purposes for

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which the land reservation is created, but where water is only valuable for a secondary use of the reservation there arises a contrary inference that the United States would acquire water in the same manner as other public or private appropriators.

Water and Water Rights: Federally Reserved Water Rights

The priority date of the Federal reserved water right for purposes of determining seniority of water rights relative to those obtained under State or other Federal law is the date of the Federal reservation or withdrawal action initiated towards a reservation.

Water and Water Rights: Federally Reserved Water Rights

The volume and scope of particular reserved water rights are Federal questions calling for the application of Federal law; State law requirements such as notice of application to beneficial use and restrictions on beneficial use are not applicable to reserved water rights.

Water and Water Rights: Federally Reserved Water Rights

Reserved water rights encompass both existing and reasonably foreseeable future water uses necessary to fulfill the purposes of the reservation.

Water and Water Rights: Federally Reserved Water Rights

While persuasive arguments can be made for and against the application of reserved water rights on acquired lands, it is the policy of this Department to obtain water rights for acquired lands through means other than the assertion of a reserved water right.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location, whether or not such flow constitutes a source of or is tributary to a water course, pond, or other body of surface water. The term "waterhole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and waterholes that existed as of that date on unappropriated, unreserved public lands.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: State Laws

The Executive Order does not affect a valid, private right to use some or all of the waters of such a source that vested under the applicable State laws, custom or usage prior to Apr. 17, 1926.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order does not withdraw artificially developed sources of water or manmade structures for collection of water on the public domain. However, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his suc-

cessor in interest by virtue of the United States' ownership of the lands.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order withdraws, by operation of law, lands which become of the character contemplated in the Order subsequent to the date of the Order; *i.e.*, vacant, unappropriated, unreserved public lands upon which springs or waterholes come into existence after Apr. 17, 1926.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: State Laws

The Executive Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or waterhole and for which a private vested right to use all of such water under applicable State law, custom and usage has previously existed upon abandonment or forfeiture of that State water right under the terms of the applicable State law, custom or usage.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The Executive Order withdraws all lands containing springs or waterholes as defined and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The priority date for the public right to use the waters of a spring or waterhole withdrawn under the Order is Apr. 17, 1926, for all public springs and waterholes existing on that date. Those public springs and waterholes that naturally come into existence at a later date are withdrawn when they come into existence.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Rights-of-Way

Any action taken by private party who did not have a vested State water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of the public waterhole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage source, and (d) flood, soil, fire and erosion control.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes: Generally

Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1976), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued, springs and waterholes on the public domain coming into existence after Oct. 21, 1976, are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still existing legislative authority to be effective.

Water and Water Rights: Federally Reserved Water Rights

The Act of June 16, 1934, 30 U.S.C. § 229a (1976), creates a reserved right when an oil and gas prospecting permittee or lessee strikes water "of such quality and

quantity as to be valuable and usable at a reasonable cost for agriculture, domestic, or other purposes" as found by the Secretary.

Water and Water Rights: Federally Reserved Water Rights—Withdrawals and Reservations: Powersites

The withdrawals of lands for powersites under 43 U.S.C. § 141 (1970) do not carry with them reserved water rights for purposes under the administration of the Department of the Interior, simply because of their reservation as a powersite.

Water and Water Rights: Federally Reserved Water Rights—Withdrawals and Reservations: Stock-Driveway Withdrawals

Water sources located within stock driveways and reserved pursuant to sec. 10 of the Act of Dec. 29, 1916, 43 U.S.C. § 300 (1970), are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors.

Oil Shale: Withdrawals—Water and Water Rights: Federally Reserved Water Rights

Oil shade withdrawals administered by the Department of the Interior have reserved water rights for the purposes of investigation, examination and classification of those lands. Water is not reserved for actual oil shale development.

Taylor Grazing Act: Generally—Water and Water Rights: Federally Reserved Water Rights

The Taylor Grazing Act created no reserved water rights.

Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Generally—Water and Water Rights: Federally Reserved Water Rights

There are no reserved water rights on the revested Oregon and California Railroad lands and the Coos Bay Wagon Road lands, the "OSC" lands.

Classification and Multiple Use Act of 1964—Water and Water Rights: Federally Reserved Water Rights

Classification of lands under the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 *et seq.* (1970), does not create reserved water rights.

Water and Water Rights: Federally Reserved Water Rights—Wild Free-Roaming Horses and Burros Act

Designation of lands as sanctuaries for wild, free-roaming horses and burros under the Act of Dec. 15, 1971, 16 U.S.C. § 1333 *et seq.* (1976), does not reserve water for the purposes of wild horse and burro drinking.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

Rivers administered by BLM that have been designated as components of the Wild and Scenic Rivers System under 16 U.S.C. §§ 1271–1287 (1976) carry with them reserved water rights sufficient to fulfill the purposes of the Act.

Federal Land Policy and Management Act of 1976: Generally—Water and Water Rights: Federally Reserved Water Rights

The Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (1976), does not establish any reserved rights in BLM lands.

Reclamation Lands: Generally—Water and Water Rights: Federally Reserved Water Rights

Sec. 8 of the 1902 Reclamation Act, 43 U.S.C. § 372 *et seq.* (1976), prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

The particular reserved water rights for national park and national monument areas include water required for scenic, natural, and historic conservation uses; wildlife conservation uses; sustained public enjoyment uses; and National Park Service personnel uses; all of which are intimately related to the fundamental purpose for park and monument reservation, as articulated in 16 U.S.C. § 1 (1976).

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

Among other reserved water rights for national parks and national monuments, 16 U.S.C. § 1 (1976), encompasses reserved water rights for concession uses to provide sustained public enjoyment and reserved water rights for waterborne public enjoyment and recreation.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

Congress has taken no action subsequent to the National Park Service Organic Act of Aug. 25, 1916, 39 Stat. 535, 16 U.S.C. § 1 (1976), to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of park areas are reserved as of the date of the enabling legislation.

National Park Service Areas: Generally

The Act of Mar. 27, 1978, 92 Stat. 166, 16 U.S.C.A. § 1a–1 (West Supp. 1979), provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically provided by Congress, in order to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

The discretionary authority contained in the Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j–2(g) (1976), authorizing the the National Park Service to acquire water rights in accordance with local laws, is not inconsistent with the assertion of the reserved water rights principle and is readily distinguishable from Acts requiring deference to State water law.

National Park Service Areas: Water Rights—Water and Water Rights: Federally Reserved Water Rights

As a general rule, the above-developed reserved water rights apply to components of the National Park System other than national parks and national monuments, though the extent of particular reserved water rights must be determined on a case-by-case basis, involving an interpretation of 16 U.S.C. § 1 (1976) and the establishing legislation.

Water and Water Rights: Federally Reserved Water Rights—Wildlife Refuges and Projects: Riparian Rights

Executive branch reservations for native bird preserves, migratory bird refuges, game ranges, fish hatcheries, elk refuges and similar refuges and preserves reserved sufficient water needed for the

maintenance of the species (*e.g.*, ecosystem food supply, breeding habitat, fire protection, domestic needs of Fish and Wildlife Service personnel) mentioned in the executive orders establishing the individual reservations.

Water and Water Rights: Federally Reserved Water Rights—Wildlife Refuges and Projects: Riparian Rights

Executive branch refuge reservations superimposed on areas previously withdrawn for powersites, reclamation or other purposes obtain reserved water rights necessary to fulfill the specific purposes for the refuge reservations.

Water and Water Rights: Federally Reserved Water Rights—Wildlife Refuges and Projects: Riparian Rights

Wildlife Refuge uses authorized by the Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1976); the Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k–460k–4 (1976); and the National Wildlife Refuge Administration Act of 1966, 80 Stat. 927, 16 U.S.C. §§ 668dd–668ee (1976), such as public recreational uses, do not obtain reserved water rights under existing precedent.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1976), contains an express, though negatively phrased, assertion of Federal reserved water rights.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

The extent of the water reserved for wild and scenic rivers is the amount of unappropriated water necessary to protect the particular aesthetic, recreational, scientific, biotic or historical features which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

Water and Water Rights: Federally Reserved Water Rights—Wild and Scenic Rivers Act

Designation of wild and scenic rivers does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserve water right.

Water and Water Rights: Federally Reserved Water Rights—Wilderness Act

Areas which are congressionally designated as wilderness under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (1976), obtain reserved water rights for the maintenance of minimum stream flows and lake levels (*e.g.*, for science appreciation and primitive water-borne recreation) and for ecological maintenance (*e.g.*, evapotranspiration for natural communities, wildlife watering, firefighting).

Federal Land Policy and Management Act of 1976: Generally—Taylor Grazing Act: Generally—Water and Water Rights: Federal Appropriation

The management programs mandated by Congress in such Acts as the Taylor Grazing Act and FLPMA require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

Federal Land Policy and Management Act of 1976: Generally—Water and Water Rights: Generally

Sec. 701(g) of FLPMA, 43 U.S.C. § 1701 notes (1976), maintains the status quo in the relationship between the States and the Federal Government on water, and allows for (a) the continued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to State law as authorized by the Desert Land Act; (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain; and (c) application by the United States to secure water rights pursuant to State law for these purposes.

Federal Land Policy and Management Act of 1976: Generally—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Generally—Taylor Grazing Act: Generally—Water and Water Rights: Federal Appropriation

FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes permit the United States to appropriate water for the diverse purposes found in the various statutes.

Federal Land Policy and Management Act of 1976: Generally—Water and Water Rights: Federal Appropriation

FLPMA authorizes the BLM to appropriate water for such uses as fish and wildlife maintenance and protection, scenic value preservation, and human consumption, and protection of areas of critical environmental concern.

National Park Service Areas: Water Rights—Water and Water Rights: Generally—Wildlife Refuges and Projects: Generally

The National Park Service and Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized function for areas under their administration.

Solicitor's Opinion of July 20, 1937, M–28853, is overruled.

Solicitor's Opinions, State of New Mexico, 55 I.D. 466 (1936), and Lee J. Esplin, 56 I.D. 325 (1938), are overruled to the extent they apply to the 1926 Executive Order to artifically developed water sources on the public lands.

Solicitor's Opinion M–33969 (Nov. 7, 1950) is disavowed to the extent that it concludes that the United States owns the unappropriated water on the public domain.

Solicitor's Opinion M–33969 (Nov. 7, 1950) is overruled to the extent that it concludes that the mere exercise of dominion and control over the water on the public domain by the United States causes the water to be reserved for public use and withdrawn from private appropriation without further action.

OPINION BY OFFICE OF THE SOLICITOR

June 25, 1979

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To: SECRETARY
FROM: SOLICITOR
SUBJECT: FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE BUREAU OF LAND MANAGEMENT

1. *INTRODUCTION*

The opinion discusses the nature and extent of the United States' rights to use water on the federal lands administered by the National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Reclamation (Reclamation), and the Bureau of Land Management (BLM) within the United States Department of the Interior. The President's Water Policy message (June 6, 1978) and subsequent memorandum to you (July 12, 1978) directed the Department to expeditiously identify, establish and quantify its non-Indian federal reserved water rights. As a part of this effort, my office has undertaken a comprehensive analysis of the reserved water rights which may be asserted on the federal lands administered by NPS, FWS, Reclamation and BLM.[1] My staff has also analyzed other (non-reserved) federal water rights. This opinion summarizes my legal conclusions.

[1] None of the other bureaus or agencies within the Department of the Interior administer significant amounts, if any, of lands for which a reserved water right may be claimed. This opinion does not deal with reserved water rights which may be claimed on behalf of Indians.

11. *NATURE OF FEDERAL-STATE RELATIONS IN DETERMINING WATER RIGHTS*

The westward expansion of the United States resulted from cessions by various foreign nations, through which the United States obtained ownership of the lands now comprising the Western States and ownership of all rights appurtenant to the lands, except those interests in lands and appurtenant rights established under previous sovereigns. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 15–16 (1935); *Knight v. United States Land Ass'n.*, 142 U.S. 161, 183–184 (1891).

The plenary power that Congress has under the Property Clause [2] by virtue of federal ownership of these lands includes the power to control the disposition and use of water on, under, flowing through or appurtenant to such lands. *See United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960) (Because the "Federal Government was the initial proprietor in these western lands * * * any claim by a state or by others must derive from this federal title."); *cf.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539–41 (1976). Congress may exercise its power to manage or dispose of all the lands and waters on the public lands, together or separately. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935); see also *United States v. California*, 332 U.S. 19, 27 (1947). No interest in the property of the United States may be acquired in the absence of an express grant from Congress; and, absent that grant or consent, it continues to be held by the United States. *United States v. Grand River Dam Authority*, *supra*; *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404–05 (1917). Such grants and disposals to the states are not lightly inferred; *i.e.*, "nothing passes but what is conveyed in clear and explicit language—inference being resolved not against but for the Government." *Caldwell v. United States*, 250 U.S. 14, 20–21 (1919); *see also Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).

It follows that to the extent Congress has not clearly granted authority to the states over waters which are in, on, under or appurtedent to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law.[3]

[2] U.S. CONST. art. IV, § 3, cl. 2 provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

[3] *See, e.g.*, Morreale, "Federal-State Rights and Relations," 2 *Waters and Water Rights*, 51–52, 81 (R. Clark ed. 1967).

The admission of a state into the Union and the "equal footing" doctrine did not divest the United States of its plenary control over such water. *Cappaert v. United States*, 426 U.S. 128, 144–45 (1976); *Arizona v. California*, 373 U.S. 546, 599 (1963). The Supreme Court has, however, recently noted the existence of one school of legal thought that this doctrine vested Western States, upon admission to the Union, with "exclusive sovereignty" over the unappropriated waters in their streams. *California v. United States*, 438 U.S. 645, 654 (1978). This school of thought is difficult to square with the reserved rights doctrine repeatedly affirmed by the Supreme Court as applying to reservations of land in a state after statehood. *See, e.g., United States v. New Mexico*, 438 U.S. 696, 698, 700, n. 4 (1978); *Cappaert v. United States*, *supra*; *cf. Winters v. United States*, 207 U.S. 564, 577 (1908).

Moreover, the states may not exercise any governmental authority over federal property unless they have been expressly granted that authority by the Congress, since Congress retains exclusive control over the acquisition of private rights in federal lands and interests. *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274 (1879); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872); *Irvine v. Marshall*, 61 U.S. (20 How.) 558, 563 (1858). Federal control over the disposition and use of water in, on, under or appurtenant to federal land ultimately rests upon the Supremacy Clause [4], which permits the Federal Government to exercise its constitutional prerogatives without regard to state law. *Cappaert v. United States*, *supra* at 145; *Arizona v. California*, 283 U.S. 423, 451 (1931); *cf., Kleppe v. New Mexico*, *supra*, at 543; *Ohio v. Thomas*, 173 U.S. 276, 283 (1899); *Johnson v. Maryland*, 254 U.S. 51 (1920).

Federal control over its needed water rights, unhampered by compliance with procedural and substantive state law, is supported by the Supremacy Clause and the doctrine that federal activities are immune from state regulation unless there is a "clear congressional mandate," *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); or "specific congressional action," *Paul v. United States*, 371 U.S. 245, 263 (1963), providing for state control. *See also Mayo v. United States*, 319 U.S. 441, 448 (1943); *Hancock v. Train*, 426 U.S. 167, 178–81 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 214, 217, 221 (1976). *Cf. Arizona v. California*, *supra*, (Congressionally authorized dam and reservoir can proceed without submitting plans and specifications to State Engineer for approval). State legislative claims to all water found within state boundaries do not alter this premise, since Congress, under the Property Clause, has the exclusive power to dispose of federal property. *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra* at 162; *Utah Power & Light Co. v. United States*, *supra* at 404.

[4] U.S. CONST. art. VI, cl. 2.

Originally, the common law riparian rules of natural flow applied to the public lands. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). There the Court opined, in *dicta*, that these riparian rules could be changed by the state legislatures if, in the absence of specific Congressional consent, they did not destroy the right of the United States to the continued flow of water bordering its lands needed for the beneficial use of government property. The Court furthermore held that the states could not destroy or interfere with the paramount power of the United States to secure the navigability of navigable streams. *Ibid.*

In the arid Western States, the state legislatures adopted the appropriation doctrine, which grew out of local mining customs. The appropriation doctrine permits beneficial water uses under a priority system ("first in time is first in right") without regard to ownership of a watercourse's abutting lands or the impacts on downstream riparian landowners. With the settlement of the public lands, conflict arose over the water rights of federal patentees claiming riparian rights and prior appropriators whose rights were recognized under local laws and customs.

Beginning in 1866, Congress passed three statutes which resolved this conflict between private users in favor of prior appropriators. These three statutes still, more than one hundred years later, provide the basis for state regulatory authority over water rights. The Acts of July 26, 1866, 14 Stat. 253, and July 9, 1870, 16 Stat. 218, 43 U.S.C. § 661 (1976), recognized and sanctioned possessory rights to water on the public lands asserted under local laws and customs, thereby validating, in effect, state appropriation water laws procedures for private users and previous trespassers on the public lands. *Federal Power Commission v. Oregon*, 349 U.S. 435, 447–8 (1955); *Broder v. Natoma Water & Mining Co.*, *supra* at 276; *Jennison v. Kirk*, 98 U.S. 453 (1878); for background on the 1866 Act, *see United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 745–49 (1950).[5] By these 1866 and 1870 Acts, Congress in effect waived its proprietary and riparian rights to water on the public domain to the extent that water is appropriated by members of the public under state law in conformance with the grant of authority found in these two Act. Thus, these two Acts confine assertion of inchoate federal water rights to unappropriated

[5] The 1866 Act provided, in pertinent part: "[W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *" [14 Stat. 253].

The 1870 Act provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights."

waters that exist at any point in time.

The third statute, the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1976), provides generally for the homesteading of the public domain in tracts larger than prior laws allowed, if the homesteader irrigated and reclaimed the land. The Supreme Court's treatment of the effect of the Desert Land Act on federal water rights has been unclear and conflicting, as developed below. The provision of the Act with which we are here concerned (43 U.S.C. § 321) was a *proviso* that the homesteader would have rights to use only that water "necessarily used for the purpose of irrigation and reclamation," and went on to state:

> [A]ll the surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

The application of this part of the Act to federal water rights requires some discussion, for several limitations appear on its face. *First*, it applies only to non-navigable sources of water. *Second*, it applies only to such sources on the public lands. *Third*, it applies to "*surplus* water *over and above such actual appropriation and use.*" (*Italics* added.) *Fourth*, it makes the water available only for "irrigation, mining and manufacturing purposes." *Fifth*, it does not directly address federal rights to use water for congressionally authorized purposes on the federal lands, but instead is aimed at appropriation and use by "the public." *Finally*, the Desert Land Act applies only to certain states, originally California, Oregon and Nevada, and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota (later to become the states of North and South Dakota). 43 U.S.C. § 323 (1976). Colorado was added later (26 Stat. 1097, Mar. 3, 1891).

Several things can be said about these limitations. *First*, the Supreme Court has been careful to repeat the Act's limitations to non-navigable waters in subsequent cases.[6] Moreover, it has squarely held that the Act does not allow the right to appropriate non-navigable waters which are sources of navigable streams "to such an extent as to destroy their navigability, * * *."[7]

On the other hand, the two predecessor Acts of the Desert Land Act

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[6] *See, e.g., United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 706 (1899); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935); *Ickes v. Fox*, 300 U.S. 82, 95 (1937); *Brush v. Commissioner*, 300 U.S. 352, 367 (1937); *Cappaert v. United States*, 426 U.S. 128, 143, 145 (1976); *California v. United States*, 438 U.S. 645, 658 (1978).

[7] *United States v. Rio Grande Irrigation Co., supra*, 174 U.S. at 706. As passed by the Senate, the provision read: "and the water in all lakes, rivers, and other sources of water supply shall remain and be held for the use of the public for purposes of irrigation and mining." *See* Cong. Rec. (Feb. 27, 1877), p. 1973. The language was changed to apply only to non-navigable waters in Conference, without explanation. Cong. Rec. (Mar. 3, 1877), p. 2156.

both recognized and ratified a pre-existing right to possession of water in accordance with local custom, laws and court decisions, *see* 14 Stat. 251, 253 (1866); 16 Stat. 217, 218 (1870); *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879), and neither statute was expressly limited to non-navigable waters.[8] Moreover, the Supreme Court has held that these two Acts are not limited to rights acquired before 1866, but "reach into the future as well * * *."[9] Therefore, the significance of the Desert Land Act's limitation to non-navigable waters is unclear.

Second, the Act's limitation to sources on the *public lands* received express recognition in *Federal Power Commission v. Oregon*, 349 U.S. at 448 (1955), which held the Act inapplicable to *reservations* of land from the public domain without distinguishing between whether the water involved was needed to carry out the purposes of the reservation, see part III A, *infra*, or was for congressionally authorized uses apart from the purposes of the reservation; see part III B.

Third, the Act's limitation to unused, unappropriated waters means that to the extent the Federal Government was using water in connection with federal land management in 1877, it was not free for "the appropriation and use of the public." But whether it prevented the Federal Government from using additional water after 1877 except in compliance with state law requires further scrutiny, provided below.

Fourth, the Act's limitation to water for "irrigation, mining and manufacturing purposes" has not been found by the Supreme Court to be particularly significant. In 1935 the Court, purporting to give this language its "natural meaning," held that it "effected a severance of *all* waters upon the public domain, not theretofore appropriated, from the land itself," apparently without limitation to the purposes for which the waters could be appropriated.[10] No mention of the limitation to certain purposes was made in subsequent Supreme Court cases.

Fifth, the fact that the Desert Land Act does not deal with federal acquisition of water rights has had varying significance for the Supreme Court over the years. Initially, in *Rio Grande*, *supra*, the Court stated (albeit in *dictum* apart from its discussion later in the opinion of the Desert Land Act), that the United States' right, as the owner of lands bordering a stream, to the continued flow of such waters "as may be necessary for the beneficial uses of government property" cannot be destroyed by state legislation. 174 U.S. at 703. This limi-

[8] Somewhat curiously, however, the Supreme Court in 1935 said these two statutes were the "test and measure of private rights in and to the *non-navigable* waters on public domain." *California Oregon Power Co., supra*, 295 U.S. at 155 (italics added).

[9] *Ibid.*; *see also California v. United States, supra*, 438 U.S. at 656–57, n. 11.

[10] *Id.*, 295 U.S. at 158 (italics added).

tation was repeated and endorsed in *Winters v. United States*, 207 U.S. 564, 577 (1908), and in *California Oregon Power Co.*, *supra*, 295 U.S. at 159. Later in the latter decision, however, the Court stated that the Desert Land Act vested the states with power "to affect the riparian rights of the *United States* [and] its grantees * * *." 295 U.S. at 162 (italics added); *see also* 295 U.S. at 164.[11]

These statements concerning the rights of the United States were *dictum*, since the case itself concerned rights of a patentee of public land, squarely covered by the Desert Land Act itself.

Twenty years later, in *Federal Power Commission v. Oregon*, *supra*, the Court said that the Desert Land Act "severed, for purposes of *private* acquisition, soil and water rights" on public lands. 349 U.S. at 448 (italics added), without expressly mentioning federal agencies' acquisition of water rights.

Twenty-one years after *FPC v. Oregon*, the Court again construed the Act as providing only that *patentees* of public land "must acquire water rights in non-navigable water in accordance with state law." *Cappaert v. United States*, *supra*, 426 U.S. at 143. The Court went on to state flatly: "Federal water rights are not dependent upon state law or state procedures * * *." 426 U.S. at 145. To the extent that the remark applies to federal non-reserved water rights, it is *dictum*, because the case itself concerned a federal reserved right.

Two years later, however, the Supreme Court, in construing the Reclamation Act, found occasion to observe in *dictum* that there are two limitations on the states' "exclusive control of its streams—reserved rights * * * and the navigation servitude." *California v. United States*, *supra*, 438 U.S. at 662. The Court cited only *United States v. Rio Grande Irrigation Co.*, *supra*, 174 U.S. at 703, for the proposition that only *reserved rights*, rather than all federal water rights needed to carry out congressionally man-

[11] Before it was revived to some extent by the decision in *California v. United States*, discussed *infra*, Dean Trelease, a noted authority on water law, commented that the decision in *California Oregon Power Co.* "now seems to be a spurious reading of the Desert Land Act." Trelease, "Federal Reserved Rights Since the PLLRC," 54 Denver L. J. 473, 476 (1977). Four years after *California Oregon Power*, the 9th Circuit cited the decision for the proposition that "*private* rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions," but that the government may, "independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain *if needed for governmental purposes.*" *United States v. Walker River Irrg. Dist.*, 104 F.2d 334, 336–37 (9th Cir. 1939) (italics added). To the extent the Court's remarks extends to non-reserved federal water rights, it is *dictum*, since the case concerned an Indian reserved water right. *See also Nebraska v. Wyoming*, 325 U.S. 589, 611–16 (1945), where the Court declined to decide whether the United States owned the unappropriated water of the Platte River, because the water rights for reclamation projects on that River were obtained in accordance with state law pursuant to sec. 8 of the Reclamation Act, 43 U.S.C. § 383 (1976), and therefore the question of ownership by the United States "of unappropriated water is largely academic * * *." 325 U.S. at 616. *See also Cappaert v. United States*, *supra*, 426 U.S. at 144, fn. 9; and *Arizona v. California*, *supra*, where the Court declined to consider Arizona's "rights to interstate or local waters which have not yet been, and which may never be, appropriated." 283 U.S. at 464 (citations omitted).

dated land management responsibilities, fall within this exception allowed by the Desert Land Act. In the passage cited by the Court in *California v. United States*, the Court had stated, in *dictum*:

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.[12]

It therefore seems plain that the *Rio Grande* Court, in construing the Desert Land Act twenty-two years after its passage, did not limit the exception to the higher reserved rights standard—the right to use waters on lands reserved from the federal domain for *specific* purposes, "where without the water the purposes of the reservation would be entirely defeated," [13]—but instead allowed it under a lesser standard, for water necessary for the beneficial uses of the government property.

It is apparent that prior Supreme Court *dicta* are somewhat at war with one another on this issue. One reason for this is found in the Desert Land Act itself. That Act was one of many statutes enacted in the latter half of the 19th and early part of the 20th centuries to promote settlement and cultivation of public domain lands. It spoke principally to the process by which arid public lands were to be irrigated and reclaimed and transferred from the public domain into private hands. *See, e.g., Williams* v. *United States*, 138 U.S. 514 (1891); *United States* v. *Healey*, 160 U.S. 136 (1895). Except to the extent the quoted language applies to the Federal Government, it addressed not at all the rights and obligations of the United States as owner of those federal lands not brought within the settlement scheme it established. Because of this, the legislative history does not contain any debate over the impact of the bill on federal water rights.

In any event, because the Supreme Court has spoken only by inconsistent *dictum* on this subject, the guidance I must give federal agencies must be based to a large degree on predicting how the Supreme Court may resolve these conflicting statements contained in prior decisions.

I am of the opinion that by these relatively narrow Acts of 1866, 1870 and 1877, the United States did not divest itself of its authority, as sovereign, to use the *unappropriated* waters on the public lands for governmental purposes. Supreme Court decisions upholding federal reserved water rights created after the effective dates of these statutes affirm

[12] At 174 U.S. 703 (1899). This passage has been repeated and endorsed several times by the Supreme Court. *See, e.g., Gutierres v. Albuquerque Land Co.*, 188 U.S. 545, 554 (1903); *Kansas v. Colorado*, 206 U.S. 46, 86 (1907); *California Oregon Power Co., supra*, 295 U.S. at 159.

[13] *United States* v. *New Mexico*, 438 U.S. 696, 700 (1978), decided the same day and as a companion to *California* v. *United States, supra*.

this conclusion (*United States* v. *New Mexico*, *supra*, at 698):

> The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission to the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *Winters* v. *United States*, 207 U.S. 564, 577 (1908); *Arizona* v. *California*, 373 U.S. 546, 579–98 (1963); *Cappaert* v. *United States*, 426 U.S. 128, 143–46 (1976).

Given the constitutional underpinning for, and the nature of, federal ownership and control of the public lands and their associated resources, it is not difficult to understand why Congress has on numerous occasions expressly provided that state law would govern the acquisition of rights to use waters on the public domain by private individuals. In a constitutional context, this so-called "express deference to state water law" [14] is essential to divest the United States of its inherent power and control over its property and to give the states the opportunity and the power to regulate the use and acquisition of resources, including water, otherwise controlled by the United States.

In both *United States v. New Mexico*, *supra*, and *California v. United States*, 438 U.S. 645 (1978), the Supreme Court identified directives in various federal laws that state law should be followed or that the federal law should not be construed to interfere with state law.[15] Each of these laws deal with a specific federal project or program, or contained general standards pertaining to the acquisition or protection of *private* rights to the use of water on the public domain. I believe that neither the Desert Land Act nor any other federal statute deals generally with how the United States should acquire and maintain rights to use water on the public domain and reserved public domain.[16]

Congress has been fully aware of the continuing problem of state-federal relations in this area and even though attempts have been made,[17] it has never acted to require compliance with state law in every instance where the United States acquires water rights. In fact, Con-

[14] *United States v. New Mexico*, *supra*, 438 U.S. at 702 (1978).

[15] *See Ibid.*, fn. 5.

[16] Of the 37 statutes referred to by the Court in *New Mexico*, *supra*, 438 U.S. at 702, n. 5, 33 contain general statements indicating that such legislation should not be construed to interfere with the right of states to control the use of water within their boundaries or that a private person or government official should comply with state law when carrying out a specific program or purpose such as constructing or planning a public works project, disposing of Indian lands, or conferring certain benefits on a state. The remaining statutes either do not mention state law or are not related to the acquisition of water rights.

[17] *See, e.g.*, S. 863, 84th Cong., 1st Sess. (1955); S. 1275, 88th Cong., 2d Sess. (1964); Morreale, "Federal-State Conflicts Over Western Waters—A Decade of 'Clarifying Legislation,'" 20 Rutgers L. Rev. 423 (1966); Corker, "Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604 (1957). A recent GAO Report summarizes some of the more important legislative proposals made over the past 25 years. *See* "Reserved Water Rights for Federal and Indian Reservations, A Growing Controversy in Need of Resolution" (GAO–CED–78–176, Nov. 16, 1978) pp. 39–50.

gress has recognized that the United States could acquire rights to use water in ways other than through state law.[18] Since Congress has not generally directed the Federal Government to comply with state water law, such compliance is required only in those specific instances where Congress has so provided. But while Congress has not directed the Federal Government to comply with state water law, neither has it prohibited the United States from voluntarily complying with such state water laws unless specifically directed.

In summary, since the Federal Government has never granted away its right to make use of unappropriated waters on federal lands, it is my opinion that the United States has retained its power to vest in itself water rights in *unappropriated* waters and it may exercise such power independent of substantive state law. *See United States v. Rio Grande Dam and Irrigation Co., supra; see also* discussion at part III B below.

[18] *See* 16 U.S.C. § 1284(c) (1976). One of the statutes on the list cited by the Supreme Court in *United States v. New Mexico, supra,* is the McCarran Amendment, 43 U.S.C. § 666 (1976). It is noteworthy that this provision —which waives the sovereign immunity of the United States in certain cases—refers to the acquisition of water rights by the United States "by appropriation under State law, by purchase, by exchange, *or otherwise* * * *" (italics supplied). The Supreme Court relied on the "or otherwise" language in holding the Amendment waived the United States' sovereign immunity for all federal water rights, including "appropriative rights, riparian rights, and reserved rights." *United States v. District Court for Eagle County,* 401 U.S. 520, 524 (1971).

III. *RETENTION AND ACQUISITION OF WATER RIGHTS BY THE UNITED STATES*

The United States retains water rights by reserving federal lands and waters necessary to fulfill specified purposes and obtains water rights by (1) appropriation of water and application to those uses authorized by Congress to carry out congressionally authorized programs on the public domain, reserved and acquired lands; and (2) acquisition of water rights through purchase, exchange or condemnation.

A. *Reserved Rights Doctrine*

The federal reserved water rights doctrine is a judicial creation[19] which holds:

> [T]hat when the Federal Government withdraws its lands from the public do-

[19] Federal reserved water rights were first explicitly recognized in a case interpreting an agreement between the United States and an Indian tribe. *Winters v. United States,* 207 U.S. 564 (1908). In *Winters,* the Court relied in part on Congress inferred intent in the Fort Belknap Agreement to transform the Indians into a "pastoral and civilized people," the need for irrigated water to make the reservation lands productive, and the construction rules resolving ambiguities in the favor of Indians, to find that the undeniable "power of the Government to reserve the waters and exempt them from appropriation under the state laws" had been exercised in this case. *Id.* at 576–577.

The concept of federal reserved water rights was first expressly extended to non-Indian federal reservations; *i.e.,* wildlife refuges, national recreation areas, national forests, in *Arizona v. California,* 373 U.S. 546 (1963), though the Court had intimated that the doctrine would be so extended several years previously. *See Federal Power Commission v. Oregon,* 349 U.S. 435 (1955). In *Arizona v. California,* the Court expressly held that the

main and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a reserved water right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water is empowered by the Commerce Clause, Art. 1, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.[20]

Reserved water rights are most often created by implication rather than by express reservation. The intent to reserve water "is inferred if the previously unappropriated water is necessary to accomplish the purposes for which the land reservation is created," because the courts have reasoned that the Federal Government would not reserve lands for specific purposes unless it also intended to reserve unappropriated water necessary to fulfill those purposes. *Cappaert v. United States*, *supra* at 139; *see United States v. New Mexico*, *supra*, at 701–02. However, "[w]here water is only valuable for a secondary use of the reservation * * * there arises the contrary inference that Congress intended * * * that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, *supra* at 702. Thus, there is an important distinction between the purposes of a land reservation and secondary or subsidiary management apart from the reservation purpose(s); *i.e.*, only the former obtain water rights by the act of reserving the land for particular purposes. This distinction is further explored in part III B, *infra*.

The measure of the federal reserved water right is that quantity of water needed to accomplish the purposes of the reservation and no more. *Cappaert v. United States*, *supra*. The priority date of the federal reserved water right for purposes of determining seniority of water rights relative to those obtained under state or federal law is the date of the federal reservation or withdrawal action initiated toward a reservation. A reserved water right may be created by an Act of Congress (*United Statest v. New Mexico*, *supra*), a Presidential Proclamation (*Cappaert v. United States*, *supra*), an executive order (*Arizona v. California*, *supra*), a treaty (*Winters v. United States*, *supra*), a Secretarial land order (*Arizona v. California*, *supra*), or other departmental action ultimately creating a reservation (*United States v. Walker River*

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"principle underlying the reservation of water rights * * * was equally applicable to other federal establishments." *Id.* at 601. Subsequently, numerous cases have applied the reserved water rights doctrine to withdrawals and reservations under the jurisdiction of NPS, FWS and BLM. *See, for example Cappaert v. United States, supra; In the Matter of the United States of America, Water Division's 1, 5 and 6*, Civil Nos. W-425 etc. (Colo. D.C., Mar. 6, 1978), *appeal pending* (Nos. 79-SA99 and 100, Colo. Sup. Ct.).

[20] *Cappaert v. United States*, *supra*, at 138.

Irrigation Dist., 104 F.2d 334 (9th Cir. 1939)).

State law requirements such as notice of application to beneficial use are not required to perfect reserved water rights. *Cappaert v. United States*, *supra*, at 143, 145. The "volume and scope of particular reserved rights, are federal questions" calling for the application of federal law (*e.g.*, the fact that state water law systems may not provide for minimum instream flows is irrelevant if such flows are needed to carry out the purposes of the reservation); though state courts are competent to initially determine federal reserved water rights in McCarran Amendment (43 U.S.C. § 666 (1976)) proceedings. *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971). Finally, reserved water rights encompass both existing uses and future water requirements necessary to fulfill the purposes of the reservation. *See Arizona v. California*, 373 U.S., *supra*, at 600–601.

In sum, the federal reserved water right is created by implication as well as by express language in the reservation of public land for particular purposes. It arises from federal law, and is not dependent on state law for its existence or perfection. It does not require that water be put to actual use, and therefore is different from the concept of appropriation of water upon which Western States principally, but not exclusively,[21] rely. It establishes a right to water to carry out the purpose(s) of the federal reservation as of the date the reservation is created, whether the water is actually put to use and whether future appropriators under state law have actual knowledge of its existence. Certain other contours of the reserved water rights doctrine "remain unspecified" and guiding the Department's approach to some of these must await concrete fact situations, in the absence of precedent to guide reasonable assertion of reserved water rights. *See United States v. New Mexico*, *supra*, at 700.[22] This reserved right doctrine

[21] Same Western States recognize the existence of riparian rights, which may not depend upon actual use, and can create uncertainty with respect to other, "vested" state water rights based on actual appropriation and use so long as they are unadjudicated, in the same manner as unquantified federal reserved rights. *See, e.g., In Re Waters of Long Valley Creek System*, 84 Cal. App. 3d 140 (Cal. Ct. App. 1978), *appeal pending*, Cal. Sup. Ct.; *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742–55 (1950).

[22] As an example, this opinion does not discuss whether the reserved water rights doctrine applies to acquired lands. While I am of the opinion that persuasive arguments may be made both for or against the assertion of reserved rights on acquired lands of the United States, I do not find it necessary to resolve this issue in this opinion because it is the policy of the Department to acquire water rights on acquired lands through methods other than assertion of a reserved water right. *Compare* C. Wheatley, "Study of the Development, Management, and Use of Water Resources on the Public Lands," 83 (1969); Corker, "Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957," 45 Calif. L. Rev. 604, 612 (1957); Tarlock and Tippy, "The Wild and Scenic Rivers Act of 1968," 55 Cornell L. Rev. 707, 735–36 (1970); with *Federal Reserved Water Rights Task Group Report* (prepared for

is applied to the various types of federal reservations administered by the Department in secs. IV–VIII of this opinion.

B. *Federal Water Rights Obtained Through Appropriation and Use For Congressionally Authorized Purposes*

The land management agencies of the Department of the Interior have, throughout their history, appropriated water on the lands they administer to carry out congressionally authorized or mandated programs. This appropriation of water—its actual application to a federal use—is necessary to carry out the secondary uses for which many federal reservations are administered. It is also essential for the management and administration of non-reserved federal lands. No opinion on the water rights of the land management agencies of this Department would be complete without the discussion that follows on the non-reserved water rights of this Department.

Even though federal reserved rights have received the greatest judicial and political attention, the United States also has the right to appropriate water on its own property for congressionally authorized uses, whether or not such uses are part of any "reservation" of the land.

This right to use water for congressionally sanctioned purposes is not a "reserved" right. That is, it does not arise by implication from the reservation of land for particular purposes, but instead arises from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on federal lands. Unlike the reserved right, this federal right to appropriate water (like all state-recognized appropriative rights) may not pre-date, in priority, the date action is taken leading to an actual use, whether consumptive or non-consumptive, and it may not adversely affect other rights established under state law. The time of its actual initiation and the purpose and quantity of the use establish limitations on the extent of the right.

The existence of the right is supported by case law and a previous Solicitor's opinion. *See* discussion and cases cited at part II, *supra*, and *United States v. District Court for Eagle County*, *supra*, at 524; *State of Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600 (D. Nev. 1958) (*dictum*); *aff'd on other grounds*, 279 F. 2d 699 (9th Cir. 1960); *Solicitor's Opinion*, M–33969, "Compliance by the Department with State Laws Concerning Water Rights," pp. 6–7 (Nov. 7, 1950); *cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973). It is also unanimously recognized by commentators and others: *e.g.*, in the words of the National Water Commission: "Federal agencies may also have made some water uses that neither comply with

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Water Resources Policy Study, Nov. 7, 1977), 7–8. A corollary issue not discussed is the application of the reserved water rights doctrine in non-public domain states.

State law nor can be justified under the reservation doctrine. The power of Federal agencies to make such uses cannot be denied under the Supremacy Clause, if the water has been taken through the exercise of constitutional power." And further: "The reservation doctrine is a financial doctrine only; it confers no power on the Federal Government that it does not otherwise enjoy. Anytime the United States needs water * * * to carry out a program authorized by the Constitution, it has ample power to acquire it." National Water Commission, *Water Policies for the Future*, at pp. 466, 467 (1973); see also F. Trelease, *Federal-State Relations in Water Law* 147; (Legal Study No. 5, prepared for National Water Commission, Sept. 7, 1971); C. Wheatley, *Study of the Development, the Management, and Use of Water Resources on the Public Lands*, 78–80, 112–116 (1969).

Although such rights are in the foregoing respects exactly congruent with ordinary state appropriation law, the appropriation for authorized federal purposes cannot be strictly limited by what state water law says is a "diversion" of water or a "beneficial use" for which water can be appropriated.

Only Congress, as I stated earlier, has the authority under the Property Clause to control the disposition and use of water appurtenant to lands owned by the United States. *See Kleppe v. New Mexico, supra; cf. United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593–97 (1973) (this case held that federal courts may fashion rules of federal law necessary to carry out important congressionally authorized programs; *i.e.*, land acquisitions under the Migratory Bird Conservation Act; where state laws do not provide appropriate standards or unduly interfere with federal programs); *United States v. Albrecht*, 496 F. 2d 906, 909–11 (8th Cir. 1974) (state law's failure to recognize property interest in an easement taken by the Federal Government to carry out the Migratory Bird Hunting Stamp Act does not prevent enforcement of easement, to carry out congressionally authorized national program). It is my opinion that, since Congress has vested only the public with the right to appropriate unappropriated water arising on, under, through or appurtenant to federally owned lands under state law, the United States itself retains a proprietary interest in those waters that have not been appropriated pursuant to state law. The United States therefore retains the power to utilize those unappropriated waters to carry out the management objectives specified in congressional directives. Such directives are authorized under the broad powers contained in the Property Clause. *See Kleppe v. New Mexico, supra.*

Any legislation enacted by Congress to accomplish management ob-

jectives on federal lands preempts conflicting state regulations or laws as a result of the operation of the Property and Supremacy Clauses of the United States Constitution. *See Kleppe v. New Mexico*, *supra*. Any authority the states may have been given to regulate and administer federal property and/or programs by the Congress may only be exercised in a manner which is "not inconsistent with clear congressional directives." *See California v. United States*, *supra*, 438 U.S. 645 at 672.

It seems plain, however, that most of the United States' appropriative (or non-reserved) water rights are recognized under the water law of most of the Western States, and therefore no conflict with state systems should generally exist. There may, of course, be conflicts between the Federal Government and provisions of state substantive law when federal agencies appropriate water for uses which are not recognized as "beneficial" under individual state water law systems, or where in-stream flows needed for federal purposes are not recognized as a "diversion" or "appropriation" of water under state law.

The question remains, however, whether and to what extent the United States must conform its assertion of non-reserved federal water rights to state law. The majority opinion in *United States v. New Mexico*, *supra*, suggests at one point that, if a reserved right does not exist, "there arises the contrary inference that Congress intended" federal agencies to "acquire water in the same manner as any other public or private appropriator." 438 U.S. at 702. It is not clear whether the Court was referring generally to the concept of appropriation of water used by the Western States, or full compliance with procedural and substantive state water law, or only compliance with state procedures. If the Court intended by this *dictum* that the United States could only assert water rights for purposes recognized as beneficial under state law, then the federal land manager would have to manage the same kind of federal lands significantly differently in different states, depending on local law. The BLM, for example, may not be able to manage lands for recreation and fishery protection in one state to the same extent that it could in a neighboring state because of differences in what are regarded as "beneficial uses" under each state's law.

The majority in *New Mexico* does not discuss whether Congress intended this anomalous result. As noted above, the Court had two years previously stated in *Cappaert v. Unitel States*, *supra*, at 145, that "[f]ederal water rights are not dependent upon state law or state procedures * * *." I must interpret the *dictum* in *United States v. New Mexico* in light of, and consistent with, prior Supreme Court pronouncements, especially since the Court did not purport to limit or overrule statements in prior decisions. Therefore, it is reasonable to conclude that although the majority

in *New Mexico* believed that non-reserved federal water rights must be acquired through some form of appropriation and actual use, I cannot subscribe to the view that these non-reserved federal water rights, used in connection with congressionally authorized land management programs, are dependent upon state law in defining their substantive contours. In my view, such a result would not comport comfortable with such Supreme Court decisions as *United States v. Little Lake Misere Land Co.*, *supra.*, recognizing the authority of the Federal Government to rely on federal law where state law interferes with congressionally authorized programs, and *Paul v. United States*, *supra*, requiring an express action by Congress to delegate federal prerogatives to state authorities; and would contradict the unanimous view of the authorities cited above that the Federal Government's right to appropriate unappropriated water necessary to carry out congressionally mandated management functions cannot be defeated by state law definitions of beneficial use or diversion.

While I am firm in my opinion that federal non-reserved water rights are not dependent upon the substantive contours of state water law, the issue whether they must be perfected under state procedures is a closer question; *e.g.*, while congressionally authorized programs may plainly be frustrated in certain states if the substance of state law is binding on federal agencies, *cf.*, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), no equal danger is posed by compliance with state procedures.

Complying with state procedural law has certain advantages. It puts subsequent state appropriators on clear notice of federal rights, reduces uncertainty, and allows better integration of state and federal water rights. It is also literally consistent with one interpretation of the *dictum* in *United States v. New Mexico*, *supra; i.e.*, the United States would acquire water in the same way—by the same procedures—as any appropriator.

While predicting the outcome if and when this issue reaches the Supreme Court is difficult, given the conflicting indications over the last hundred years of decisions construing the 1866, 1870 and 1877 Acts, I am of the opinion that the better policy is to follow state law in acquiring federal water rights to the greatest practicable extent. This includes following state procedural law in all cases involving appropriation of non-reserved water rights and state substantive law where that law recognizes the federal appropriative rights in all pertinent respects.

I am unable to say that such compliance is required as a matter of law, but because it may be required, the safer course is to follow state procedures in perfecting non-

reserved water rights. Although I have determined that Interior agencies should comply with state law to the greatest practicable extent, this should not be construed as a waiver of any rights to the use of water which agencies of this Department have established in the past, even if the use relates to other than a reserved right and is of a type which agencies should make application for through state procedures in the future. Interior agencies should, however, attempt promptly to record these existing uses with the states.

Therefore, application should be made pursuant to state procedural law for all uses of water Interior land management agencies are making and plan to make on the federal lands they manage which are not covered by reserved rights, as discussed more specifically in parts IV–IX below.

C. *Other Methods for Acquiring Water Rights*

The United States has available other methods by which it can acquire water rights for use on federal lands. Chief among these well-recognized methods are purchase, donation, exchange or condemnation. Congress, pursuant to its power to provide for the management of federal lands under the Property Clause and its authority to appropriate funds for carrying out the mandated land management objectives, can appropriate funds for the use of the land management agencies to purchase water rights needed to carry out Congress directives.[23] Water rights are sometimes purchased, along with the land, when establishing such areas as fish and wildlife preserves. The United States also has the authority to exchange parcels of land or other property interests with non-federal parties or accept donations of land and interests therein. This includes the right to exchange lands carrying water rights or the water rights themselves.[24]

Finally, the United States, as an incident of sovereignty, may condemn lands or interests therein when necessary to carry out federal programs. *Kohl v. United States*, 91 U.S. 367 (1875). This power of condemnation includes the condemnation of water rights. *Dugan v. Rank*, 372 U.S. 609 (1963).

IV. *RESERVED WATER RIGHTS APPLICABLE TO AREAS ADMINISTERED BY BLM*

This section discusses the reserved water rights doctrine as applied to BLM lands. The most important reservations administered by the BLM which have judicially recognized reserved water rights are public springs and water holes reserved under 43 U.S.C. §§ 141, 300 (1970) and 30 U.S.C. § 229a (1976).[25]

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[23] *See, e.g.*, 16 U.S.C. §§ 17j–2, 715a 718d, 1277 (1976).

[24] *See, e.g.*, 16 U.S.C. § 1277 (1976).

[25] *In the matter of the Application of Water Rights of the United States of America, Colo. Water Divs. 4, 5, 6*, p. 38, *et seq.*, Opinion of Judge Stewart (Mar. 15, 1978), *appeal pending* (Nos. 79–SA99 and 100, Colo. Sup. Ct.).

A. *Public Water Holes and Springs*

I. *Statutory Background and Legislative History*

In the Act of Dec. 29, 1916,[26] Congress directly addressed the reservation of public springs and water holes and specifically included them as available for reservation under the broad authority previously granted the President in the Pickett Act.[27] Sec. 10 of the 1916 Act, formerly 43 U.S.C. § 300 (1970), provided, in pertinent part (italics added):

> Lands containing waterholes or other bodies of water *needed or used by the public for watering purposes* shall not be designated under sections 291 to 301 of this title but *may be reserved under the provisions of sections 141 to 143 of this title* [the Pickett Act] and such lands, prior to December 29, 1916, or thereafter reserved shall, while so reserved, be kept and held open to the public use *for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe* * * *.

The Pickett Act authorized the President to withdraw lands for "other public purposes" and the 1916 Act stated that reservations may be created when "needed or used by the public for watering purposes" or "for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe." The purposes for which the public may use the water on these reserved water holes or other bodies of water under secs. 141 and 300 must therefore be determined by interpretation of these sections, their legislative history, Executive Orders making the withdrawals, and the regulations of the Department of the Interior relating to these reservations.

Sec. 10 of the 1916 Act was part of the congressional plan to implement a system of stock raising homesteads in the western United States. It provided the Secretary of the Interior with authority to designate certain areas in the West for stock raising homesteads of 640 acres.[28]

The purpose of Sec. 10 was described by the House Committee on Public Lands as follows:

> This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding

[26] 43 U.S.C. § 291 *et seq.* (1976).

[27] 43 U.S.C. § 141 (1970), commonly referred to as the Pickett Act, was enacted on June 25, 1910, and provided:

> "The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, *or other public purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." [Italics added.]
>
> Pursuant to the authority granted by this section, certain public water reserves were created; *e.g.*, Public Water Reserve No. 19, issued by President Wilson on May 4, 1916. The Pickett Act was repealed by sec. 704(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 Note; however, existing withdrawals remain in force until changed in accordance with the Act. § 701(c); *ibid.*

[28] 43 U.S.C. § 300 (1970).

tracts of country, so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.[29]

2. *The 1926 Withdrawal*

Most of the reserved springs and water holes were created by the Public Water Reserve No. 107, Executive Order of Apr. 17, 1926.[30] That general withdrawal of public lands states:

> [E]very smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all lands within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be, and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of Dec. 20, 1916 (39 Stat. 862), and in aid of pending litigation.

Following the issuance of Public Water Reserve No. 107, Executive Order of Apr. 17, 1926, the Department of the Interior adopted regulations pursuant to the direction in sec. 10 that water holes are to be reserved "* * * for such purposes under such general rules as the Secretary of the Interior may prescribe * * *." Those regulations provide in pertinent part that:

> The Executive Order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes.[31]

This blanket withdrawal had the effect of reserving not only the *land*, but also the *water* for public use, *see Jack A. Medd*, 60 I.D. 83 at 99 (1947); however, no specific purposes were set forth in this general withdrawal. The 1926 withdrawal was made in response to the fact that, prior to that time, effective control over vast areas of the public domain could be, and in some cases was, gained merely by securing patents to small tracts surrounding available water sources of a given area. By controlling access to the

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[29] H.R. Rep. No. 35, Jan. 11, 1916, 64th Cong. 1st Sess.

[30] Numerous other specific withdrawals were made both prior and subsequent to the 1926 withdrawal, pursuant to the authority granted in the 1910 and 1916 Acts. See, *e.g.*, Public Water Reserve No. 19, Colo. No. 1, May 14, 1914; Public Water Reserve No. 60, Colo. No. 2, Feb. 25, 1919; Exec. Order 5389 (July 7, 1930). These reserves are generally local in character or otherwise minor, and are not dealt with individually in this opinion. The general approach adopted here in relation to the 1926 Order is, of course, applicable to these reservations.

[31] *See* 43 CFR 2311.0-3(a)(2). The original regulations issued with respect to the Apr. 17, 1926 Executive Order were contained in Instructions issued by the Commissioner of the General Land Office as Circular No. 1066, May 25, 1926, 51 L.D. 457. The first paragraph of the Instructions was substantially the same as the language quoted above. The remaining part of the Instructions required affidavits to be filed with every selection, filing or entry stating that no such spring or water hole existed within the boundaries of the land applied for or within one-quarter mile of the external boundaries of the tract. Even though 43 U.S.C. §§ 141 and 300 were repealed by FLPMA, § 701(c) of that Act provides that all existing withdrawals on the date of enactment shall remain in force until changed in accordance with the Act.

available water, a person could effectively retain exclusive use of great expanses of public lands. Stated another way, the water is often the key to the use of the land and land is the key to gaining access to the water.

The 1926 reservation was designed to prevent this private monopolization of water on the public domain. The means used was the traditional and most effective way of preserving resources on the public domain, *i.e.*, restricting entry by withdrawing the land and thus maintaining the water thereon open and free for public use. After the withdrawal, therefore, a party desiring to use the water either on or off the reservation would be required to obtain permission to do so from the United States through some form of permit. The permitting process allowed the United States to determine that the proposed use was in the public interest and not in derogation of the purposes of the reservation.

3. *Purposes of the 1926 Withdrawal*

The 1916 Act referred to water holes "needed or used by the public for watering purposes," and authorized the reservation "for such purposes * * * as the Secretary of the Interior may prescribe." The 1926 Order reserved the water holes "for public use." It is obvious that the purposes for which the public water holes and springs were withdrawn include stock watering and human consumption.[32]

We must, however, examine whether other purposes were also contemplated by the withdrawals. Such other purposes arguably might include, among other things, wildlife watering; range improvement, protection and management; agricultural irrigation; and watershed protection.

The language and legislative history of the public springs and water hole withdrawals, as well as the Department regulations, compel a conclusion that the purposes for which public springs and water holes were withdrawn were relatively narrow and specific. Water was, however, needed for purposes other than stockwatering and human consumption on the public lands that were intended to be homesteaded and patented pursuant to sec. 10 of the 1916 Act. Water was also needed for additional purposes on the unpatented public domain surrounding these soon-to-be-private lands that would be used by the influx of new settlers and homesteaders for livestock grazing and other uses.

I am therefore of the opinion that those other purposes include only (1) water for growing crops and sustaining fish and wildlife to allow the settlers on the public land to obtain food for their families and provide forage for their livestock; and (2) water for flood, soil, fire and

[32] *Colo. 4, 5, 6, supra* at 40.

erosion control, the control of which was essential to protect the public and to allow the new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation where, for example, an uncontrolled prairie fire could completely destroy a home, life, belonging, livestock and forage.[33]

There are two additional questions closely related to the purposes of the withdrawal. These are: (1) What quantity of water was withdrawn at each location by the 1926 Executive Order? and (2) Where may the waters so withdrawn be put to use for the stated purposes?

On the first question, it is clear that the 1926 Order was directed not so much at reserving 160-acre parcels of land as it was at preventing private acquisition of these scarce water resources.[34] It is therefore my opinion that the quantity of water reserved at each public water hole or spring is the total yield of each source. To claim less than that quantity would allow private rights to interfere with the public uses in derogation of the clear intent of the withdrawal. This is not to say, however, that the BLM may not make such reserved water available to private users of the public land under permits or licenses; rather it means only that the BLM must decide whether and the extent of which such private use is compatible with the purposes of the withdrawal, and federal land management policies generally.

On the second question, there is no indication that the purposes for which the water was reserved were to be exclusively accomplished within the confines of the relatively small tracts of land withdrawn. Such a conclusion is, in fact, absurd in view of the thousands of acres of public lands which then and even now surround these public water sources and of the surrounding private lands that were homesteaded and patented under the 1916 Act, the full use of which were and still may be dependent upon the water reserved by this order. The withdrawal order cannot be reasonably interpreted to prevent the use of these reserved waters on nearby public or private lands beyond the area of land reserved. Considering that the purpose of the withdrawal was to fulfill a great public need in providing water for human consumption, livestock watering, and other purposes noted above, these uses may, in my opinion, be made of the water other than simply on the withdrawn lands.[35]

4. *Types of Springs and Water Holes Subject to the 1926 Withdrawal*

a. Small Springs and Water Holes

[33] These purposes are somewhat broader than those contained in the Master Referee's Findings in *Colo. 4, 5, 6* which were confirmed by Judge Stewart. *Partial Master Referee Report Covering All of the Claims of the United States of America, Water Divs. 4, 5, 6, Colo.*, 38–42, but I believe are justified given the history and manifest, purposes of the 1926 Order.

[34] *See* discussion, *supra*, part IV A.2.

[35] This opinion does not deal with the authority by which private persons may obtain authority to transport water off the withdrawn lands.

The 1926 Executive Order was a blanket withdrawal of "every" parcel of public domain land containing "a spring or waterhole." No distinction was made on the face of the Executive Order as to the quantity of water in the water source to be reserved. The legislative history of the acts authorizing the withdrawal, the events leading up to, and reasons expressed for, the 1926 withdrawal, and the regulations promulgated by the Department following the Executive Order of Apr. 17, 1926 are clear, however, that "lands having small springs or water holes affording only enough water for the use of one family and its domestic animals," [36] were to be excluded from the withdrawal. The Executive Order must be construed in light of, and is limited by, the congressional grant of withdrawal power in 43 U.S.C. § 300 (1970). That Act and legislative history are consistent with the regulations.[37] In my opinion, only important springs and water holes providing enough water for general watering purposes beyond the needs of providing food and forage for just one family and its domestic animals were withdrawn by the 1926 Executive Order.

[36] 43 CFR 2311.0–3(a)(2). Original Circular No. 1066, May 25, 1926.

[37] *See, e.g.*, H.R. Rep. No. 35, *supra*, F.N. 29, referring to "important water holes, springs and other bodies of water * * * necessary for large surrounding tracts of country * * *."

b. Artifically Developed Springs and Water Holes

Prior Interior decisions have reached somewhat differing conclusions on the applicability of the 1926 withdrawal to artifically developed water holes. The first of these decisions, *Santa Fe Pacific Railroad Co.*,[38] held that:

> It is not believed that said order contemplated the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use. Such a tract is not land which "contains a spring or water hole" in its natural condition, and it was not intended to withhold such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon.[39]

A Solicitor's Opinion rendered six year later, however, held that the 1926 Order was applicable to an artificially developed water source. *State of New Mexico* [40] held that:

> The springs or water holes withdrawn are, as the regulations state, "springs and water holes capable of providing enough water for general use for watering purposes." A water hole may be created by a flow from a well as from a spring or natural seep, and the fact that it was developed or brought into being by human agency, if rights thereto do not exist under the laws of the State, would not take it out of the letter or the spirit of the order.
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> * * * * *

[38] 53 I.D. 210 (1930).

[39] *Id.* at p. 211.

[40] 55 I.D. 466 (1936).

[The 1926 Order is] a continuing withdrawal and attaches to any lands that were at the time of its issuance or subsequently become of the character and status defined in the order.[41]

Two years later, in *Lee J. Esplin*,[42] the Solicitor held that if the man-made water hole had been abandoned at the time of the 1926 Order, then it was withdrawn thereby. On the other hand, if the water hole had not been abandoned by the original developer or his successors in interest, then the Executive Order would have never attached.[43] In short, the decision holds that the 1926 Order does not apply to man-made or artificial structures upon the public domain unless they are abandoned by the original developer or his successor in interest.

That same year, in *A. T. West and Sons*, the Solicitor held, citing *Santa Fe Pacific Railroad*, *supra*, that, because the water hole was not natural and had been developed and continuously used by West since 1887, it was not of the character withdrawn by the 1926 Order.[44]

The above decisions are the only ones found which relate to the prospective effect of the 1926 Order and its application to artificially developed water sources. I agree with the general conclusions reached in the earlier decision of this Department that the 1926 Order does not apply to man-made or artificial structures on the public domain if the developer holds a valid, vested water right to such source under state law at the time of development.

I cannot agree, however, with the inference in some of the opinions of my predecessors that the 1926 Order causes a reservation of all artificially developed water sources upon their abandonment.[45] The intent of the 1926 Executive Order was, as I earlier stated at part IV. A. 2. *supra*, to reserve naturally occurring water sources on the public domain in order to prevent monopolization of large tracts of surrounding land by one or a few individuals. It was not intended to reserve lands containing artificial sources such as a metal stock tank.

[41] *Id.* at p. 467, 468. *See* discussion, *Infra* at part IV B.1., of the Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229a (1976); concerning water producing oil and gas wells. Even though *State of New Mexico* dealt with such a well, it does not appear that the requirements of that Act were met in that case. Therefore, the decision rested solely on the effect of the 1926 Order, and the Solicitor did not rely on, or even cite, the 1934 Act in reaching his conclusion.

[42] 56 I.D. 325 (1938); *see also* M-36625 dated Aug. 28, 1961.

[43] The 1938 opinion interpreted Executive Order 5389 dated July 7, 1930, which withdrew all hot springs or springs with curative properties existing on vacant, unappropriated, unreserved public lands. The order authorized the lease of those springs for public purposes under the Act of Mar. 3, 1925 (43 Stat. 1133). The Solicitor held that the Executive Order was a continual withdrawal attaching to lands which became of that character after the date of the order. It was also held that the order applied to such water sources developed by other than natural forces, such as drilled wells, although all such withdrawals were held subject to prior rights established under state law.

[44] 56 I.D. 387 (1938). The decision did state that once such a source was abandoned by the original developer anytime after 1926, then the withdrawal order would automatically attach, converting the once private source into a public water reserve. (The Solicitor cited the unreported decision of *Charles Lewis*, July 29, 1935, for this proposition.)

[45] I am therefore overruling expressions in prior opinions, such as *State of New Mexico*, 55 I.D. 466 (1936) and *Lee J. Esplin*, 56 I.D. 325 (1938) to the extent they apply the 1926 Order to artificially developed water sources on the public lands.

When, however, the artificial (or man-made) structures are abandoned or forfeited by non-use, the United States as the owner of the real property succeeds to the ownership of the structures (as in the case of all fixtures) and may put the water from the developed source to beneficial use on the public domain.

c. Springs and Water Holes Which are Tributaries of Streams

In its unreported decision in *Hyrup v. Kleppe*,[46] the 10th Circuit Court of Appeals appeared to restrict the effect of the 1926 withdrawal, citing a 1927 Solicitor's Opinion for support,[47] by holding that the 1926 withdrawal did not apply to a spring if its flow rose to the dignity of a running stream and was tributary to a natural water course. The *Hyrup* court did not define the term "tributary" in the opinion. In fact, there is no indication that the court considered placing any meaning on the term other than its common usage. This could be an important issue when viewed against a backdrop of state laws which attach significantly different meanings to the term, particularly in the context of defining which waters are subject to appropriation under state law.[48]

Whether the waters of a particular spring or water hole are reserved is in each instance, however a federal question calling for the application of federal law, *U.S. v. District Court of Eagle County*, *supra* at 526, and not dependent on state law or procedure. *Cappaert v. U.S.*, *supra* at 145. It is thus clear that *Hyrup* does not, and could not under the holdings of the Supreme Court, stand for the proposition that the United States is subject to varying state definitions of such terms as "tributary," "spring," and "water hole," that in turn are always subject to change by state legislatures.

[46] Nos. 76–1452 and 76–1767 (10th Cir., Nov. 7, 1977).

[47] Opinion of the Solicitor dated Mar. 8, 1927. The Solicitor's Opinion referred to in the opinion of the 10th Circuit did not, contrary to the court's assertion (slip op. pp. 10–11), conclude that the Executive Order applied only to springs and water holes which are not tributary to a stream. The opinion did not even address that issue; rather, it merely stated that the withdrawal could not be used as authority to reserve two tracts bordering on the Henrys Fork River in Wyoming for purposes of stock watering. The Henrys Fork is a perennial stream tributary to the Green River. It does not arise upon, but only flows through, BLM land. The Solicitor concluded that the 1926 Order did not effect withdrawals of lands bordering perennial rivers since they clearly did not fit the definition of a "spring" or "water hole." The opinion went on to conclude, however, that the withdrawal did apply to a water hole in the bed of an intermittent stream.

[48] In Colorado, for example, there is a presumption that all water is tributary to a natural watercourse and thus subject to appropriation. *See Safranek v. Limon*, 123 Colo. 330, 228 P.2d 975 (1951); *Cline v. Whitten*, 150 Colo. 179, 372 P.2d 145 (1962), holding a spring to be part of the stream. *See* Colo. Rev. Stat. 1973 § 37–92–101 *et seq.*, and *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), *cert. den.* 421 U.S. 996 (1975), where the court found that groundwater which would take 178 years to reach a stream was not tributary.

I believe that Congress, in authorizing the Executive withdrawals in the 1910 and 1916 Acts, intended to confer broad authority to preserve for public use the sources of water on the public domain which were necessary for the proper development and use of the lands. The Executive withdrawals of 1926, and those which preceded it, were intended to prevent the recurrence of past abuses on the public domain and affected *all* water holes and springs as commonly defined. These water sources, as of the date of the withdrawals, were no longer subject to private appropriation under state law. I am also of the opinion that abandonment of a spring or water hole as defined herein by an individual who had a vested water right to that source pursuant to state law causes the 1926 Executive Order to attach at the time of abandonment. Whether a given source is or has been affected by the withdrawal is a matter of federal law. *See, e.g., Cappaert* v. *United States*, 426 U.S. 128, 143–46 (1976). I am therefore of the opinion that actions by a state legislature in defining classes of water cannot alter the effect of the federal action.

5. *Effect of 1926 Withdrawal on Water Rights Established Under State Law*

Previous decisions of this Department, with which I fully concur, have uniformly held that the 1926 Order (like all reservations creating reserved rights) cannot interfere with a water right vested under state law prior to the 1926 withdrawal date.[49]

Where a state water right does not vest until after 1926, however, that water right is ineffective against the 1926 withdrawal. For example, in *Jack A. Medd*[50], the Department found that a 1940 permit was ineffective to appropriate the waters of the springs since those waters had been reserved in 1926. The *Medd* decision, standing for the proposition that a state appropriative permit issued subsequent to the 1926 withdrawal is ineffective to confer a right in the permittee, is hereby reaffirmed.

The United States is not required to object to attempts to appropriate those waters under state law at points off the public domain. The private appropriator establishing a right under state law after Apr. 17, 1926, acquires his right with constructive notice that, to the extent of the yield of the reserved source, his right would be subject to the prior rights of the United States, whether exercised prior to or subsequent to the state-sanctioned private use.[51] This is, of course, the necessary result of the general concept of the reserved right, as recognized by the Supreme Court. Considerations of comity suggest, however, that the BLM should object to such attempted appropriations of water subject to a reserved right when it learns about them.

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[49] *See Thomas Morgan*, 52 L.D. 735 (1929); *State of Arizona*, 59 I.D. 14 (1945); *A. T. West & Sons, supra.*

[50] 60 I.D. 79 (1947).

[51] *See* discussion at part III A., *supra.*

6. *Summary of the Effect of the 1926 Order*

From the discussion above considering the plain intent and purpose of the 1926 Executive Order, the congressional acts under which it was issued, and the subsequent Departmental interpretations relative thereto, I have reached the following conclusions concerning the legal effect of the 1926 order:

1. I believe the following definitions are consistent with the Executive Order and the cases construing it; *e.g.*, *Santa Fe Pacific Railroad Co.*, 53 I.D. 210 (1930): For purposes of the Executive Order of Apr. 17, 1926, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location whether or not such flow constitutes a source of or is tributary to a water course, pond or other body of surface water. The term "water hole" means a dip or hole in the earth's surface where surface or groundwater collects and which may serve as a watering place for man or animals.

2. The Executive Order withdrew, as of Apr. 17, 1926, all lands containing important springs and water holes, as defined herein, that existed as of that date on vacant, unappropriated, unreserved public lands.

3. The Order does not affect a valid private right to use some or all of the waters of such a source that had vested under the applicable state laws, custom or usage prior to Apr. 17, 1926.

4. The Order does not withdraw artificially developed sources of water or man-made structures for collection of water on the public domain; however, any interest held in those artificially developed or constructed sources or structures passes to the United States upon abandonment by the developer or his successor in interest by virtue of the United States' ownership of the land.

5. The Order withdraws, by operation of law, lands which become of the character contemplated in the order subsequent to the date of the order; *i.e.*, vacant, unappropriated, unreserved public lands upon which springs or water holes, as defined herein, come into existence after Apr. 17, 1926. (*See also* para. 8, *infra.*)

6. The Order withdraws, by operation of law, any vacant, unappropriated, unreserved public land upon which is located a spring or water hole, as defined herein, and for which a private vested right to use all of such water under applicable state law, custom and usage has previously existed; upon abandonment or forfeiture of that state water right under the terms of the applicable state law, custom or usage. Of course, a person holding a valid, vested private right to use water of a spring or water hole on vacant, unappropriated, unreserved public lands may transfer that right

in accordance with the applicable state law, but no private right can be perfected after abandonment or forfeiture of a right; *i.e.*, the withdrawal attaches immediately upon forfeiture or abandonment.

7. The Order has withdrawn all lands containing springs and water holes, as defined, and subject to the limitations set forth above, regardless of whether the water source has been the subject of an official finding as to its existence and location.

8. The priority date for the public right to use the waters of a spring or water hole withdrawn by the Order is Apr. 17, 1926, for all public springs or water holes existing on that date. Those public springs and water holes that naturally come into existence at a later date are withdrawn when they come into existence.

9. Any action taken by a private party who did not have a vested state water right prior to Apr. 17, 1926, or had not received appropriate permission from the United States subsequent to that date to make use of a public water hole or spring withdrawn by the Order is a nullity and of no force and effect. Any entry onto the reserved land for such purpose constitutes a trespass.

10. The purposes for which water is reserved under the 1926 Order are (a) stockwatering, (b) human consumption, (c) agriculture and irrigation, including sustaining fish, wildlife and plants as a food and forage sources, and (d) flood, soil, fire and erosion control.

11. Because the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* (1976), (FLPMA), repealed both authorizing statutes under which the Apr. 17, 1926, Order was issued,[52] springs and water holes on the public domain coming into existence *after* Oct. 21, 1976 are not withdrawn by the Apr. 17, 1926, Order but must be withdrawn under other, still-existing legislative authority to be effective.

B. *Other BLM Reserved Rights*

Any other reserved rights which BLM might hold and administer on behalf of the U.S. must have a basis in other statutes or orders pertaining to the public lands. Because most BLM-managed lands are by definition non-reserved public domain, the reserved water rights doctrine is, therefore, not generally applicable.[53] Because hundreds of laws and thousands of executive actions over the years have dealt with BLM lands, it is possible that some of these have created reserved rights in addition to those discussed below; however, the discussion that follows addresses the important laws of general applicability. The approach set forth in this opinion should govern examination of any other laws and executive actions not specifically discussed herein.

[52] Sec. 10 of the Act of Dec. 29, 1916 (formerly 43 U.S.C. § 300 (1970), and the Pickett Act, 43 U.S.C. § 141 (1970), were repealed by FLPMA's sec. 704(a).

[53] The Supreme Court underscored this in the *New Mexico* case by referring to the reservation of water for land which is "withdrawn from the public domain for specific federal purposes." 438 U.S. at 698.

1. *Act of June 16, 1934*

The Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. § 229a (1976), provides [54] that all oil and gas prospecting permits or leases issued shall be subject to the condition that if water is struck by the permittee or lessee instead of oil or gas, the Secretary, upon finding that the well is capable of producing water "of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic or other purposes," [55] may purchase the well and provide for the use thereof "on the public lands or disposing of such water for beneficial use on other lands * * *." [56] A previous Solicitor's Opinion held that the United States must obtain a right pursuant to state law in order to use the water of a well withdrawn by the 1934 Act.[57] This opinion is contrary to the reserved right doctrine and holdings of the Supreme Court [58] and I therefore overrule that Opinion.

The Departmental regulations relative to this section are contained in 30 CFR, Part 241. These regulations provide that once an oil or gas well is found to be valuable for water production it will be purchased and "the land subdivision which contains the well will, if subject thereto, be held to be withdrawn by Executive Order of Apr. 17, 1926, and reserved for public use pursuant to Section 10 of the Act of December 29, 1916." [59]

Lands containing these types of water wells are actually hybrids, owing their reserved status to the 1916 Act and the 1926 Executive Order as well as the 1934 Act. The priority date for water uses from such a source is the date it was developed. The purposes for which the water could be used are stated in the 1934 Act itself as "agricultural, domestic or other purposes." It is my opinion that the term "other purposes" specified in the 1916 Act is limited by those purposes which I have found established by the 1926 Order.[60]

Water reserved by withdrawals under the 1934 Act may also be used either on or off public lands, but

[54] This Act initially provided that the land on which such a water well is located "shall be reserved as a water hole under sec. 300 of Title 43." This provision was repealed by FLPMA's § 704(a), which also repealed 43 U.S.C. § 300 (1970). See note 52, *supra*.

[55] 30 U.S.C. § 229a(a) (1976).

[56] *Id.*, subsec. (c).

[57] Opinion of July 20, 1937 (M-28853).

[58] *See, e.g., Cappaert* v. *United States, supra; United States* v. *New Mexico, supra.*

[59] 30 CFR 241.5.

[60] *See* discussion on page 580, *supra*. The Master-Referee in *Colo. 4, 5, 6, supra*, at p. 328, found that the uses which could be made of the reserved water under the 1934 Act were broader than those purposes encompassed in the 1926 Order and included (1) wildlife and stockwatering, human drinking, (2) flood, soil, fire and erosion control, (3) range improvement, protection and management, (4) agricultural and irrigation uses, (5) watershed protection and securing favorable conditions of water flows and (6) recreational and fish and wildlife uses. I believe the same purposes are encompassed in both the 1934 Act and the 1926 Order, and are narrower than the Master-Referee found with respect to the former, and broader than he found with respect to the latter. *See* note 33, *supra*.

only in accordance with terms prescribed by the Secretary.[61]

2. *Power Site Withdrawals*

43 U.S.C. § 141 (1970)[62] authorized the President to "temporarily withdraw * * * public lands * * * and reserve the same for water-power sites."

Pursuant to this statute, numerous tracts of land determined to be valuable for development as power sites were reserved from the public domain. Numerous other sites were classified as valuable for power sites by the Secretary through the Geological Survey, pursuant to the authority granted by Congress.[63] Any lands so classified are automatically reserved or withdrawn from the public domain for power purposes when an application is filed under sec. 24 of the Federal Power Act for development as a proposed power project.[64]

The development of these reserved lands for power purposes is under the administration of the Federal Power Commission (now the Federal Energy Regulatory Commission). The Secretary of the Interior retains, however, the authority to administer and manage these lands for all other purposes, and can open such lands to location, entry, or selection under the public land laws, subject to the possibility of power development when it is determined by FERC that the value of such lands for power development will not be harmed by such activity.[65]

It is clear that the only purpose for the reservation of these lands is their value as sites for power development. Because the administration of these lands for this single purpose is not under the jurisdiction of this Department, I find it unnecessary to express an opinion on the question of whether water is reserved for power development on these lands.[66] I am of the opinion, however, that the uses of these lands for other purposes under the administration of this Department do not carry with them reserved water rights simply because of their reservation as a power site. Even assuming there is a reserved right for power site purposes, these other uses are clearly secondary, authorized uses of the reservation.[67] Furthermore, any power development of these lands in conjunction with a Bureau of Recla-

[61] *See* 30 U.S.C. § 229a(c) (1976) which also gives a preference right to make beneficial use of these waters to owner or occupant of adjacent lands.

[62] *Supra*, footnote 27.

[63] The Act of Mar. 3, 1879, 43 U.S.C. § 31 (1976), provides in pertinent part that "(a) The Director of the Geological Survey * * * shall have the direction of the Geological Survey, and the classification of the public lands * * *."

[64] Sec. 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1976), provides, in pertinent part, that:

"Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] commission or by Congress."

[65] 16 U.S.C. § 818 (1976).

[66] That is, any possible federal claims for a reserved water right on lands withdrawn as power sites would appropriately be made by or through the Federal Energy Regulatory Commission.

[67] *See United States* v. *New Mexico*, *supra*, 438 U.S. at 702.

mation project also does not entitle the Bureau of Reclamation to assert a reserved water right because Congress has clearly directed the Bureau of Reclamation to apply to the state for water rights for its projects under section 8 of the Reclamation Act of June 17, 1902.[68]

3. Stock Driveways

Sec. 10 of the Act of Dec. 29, 1916 (43 U.S.C. § 300 (1970)), authorized the withdrawal of public lands from entry for driveways for livestock or in connection with water holes. The purpose of these withdrawals was to allow for the unhampered passage of livestock across the public domain to non-contiguous tracts of both private and public domain lands for grazing purposes, and to provide access to those springs and water holes reserved for livestock watering purposes. I am of the opinion that these water sources located within stock driveways are reserved to the extent necessary to provide for stockwatering during the process of moving livestock through these reserved access corridors. Because FLPMA repealed the authorizing statute under which these withdrawals were issued, water sources on the public domain created *after* Oct. 21, 1976, are not withdrawn under the Act of Dec. 29, 1916, but must be withdrawn under other, still-existing legislative authority to be effective.

[68] 43 U.S.C. § 383 (1976); *California* v. *United States*, *supra*, 438 U.S. 645.

4. Oil Shale Withdrawals

The BLM manages the use of the oil shale withdrawals reserved by Executive Order 5327 (Apr. 15, 1930), subsequently amended to allow oil and gas and sodium development in Executive Orders 6016 (Feb. 6, 1933) and 7038 (May 13, 1935). The relevant language of Executive Order 5327 is as follows:

> [T]he deposits of oil shale, and lands containing such deposits owned by the United States, be, and the same are hereby, temporarily withdrawn from lease and other disposal and reserved for the purposes of investigation, examination, and classification.

Under the "specific purpose" test formulated in *New Mexico*, *supra*, it appears that these oil shale withdrawals also withdrew enough water as is reasonably necessary for the "purposes of investigation, examination and classification." The investigation and examination of these oil shale-bearing lands are preliminary steps to classifying these lands as valuable for oil shale development. I find nothing, however, in Executive Order 5327 which would permit the inference of an intent to reserve water for actual oil shale development. Thus, I conclude that, while there is an inferred intent to reserve waters reasonably necessary for preliminary investigation, examination and classification of oil shale-bearing lands, Executive Order 5327 does not, by itself, create any reserve water rights for

the development of oil shale in the withdrawn area.[69]

5. *The Taylor Grazing Act* [70]

The Taylor Grazing Act established a comprehensive program which allows individual stockraisers to use the public lands for grazing. Congress directed that BLM manage the public domain for grazing purposes so as

> to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement and development of the range; and * * * to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate * * * [the public domain]. [71]

The Taylor Grazing Act did not reserve any land from the public domain, but rather authorized the Secretary to manage the public lands for grazing "[I]n order to promote the highest use of the public lands pending its final disposal * * *." [72] Moreover, Congress specifically provided in 43 U.S.C. § 315b (1976), in pertinent part, that

> nothing in this subchapter shall * * * diminish or impair any right to the possession and use of water * * * which has heretofore vested or accrued under existing law validity affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

Therefore, no reserved water rights were created by the Act.

6. *O&C Act*

The Oregon and California Railroad Lands and Coos Bay Wagon Road Lands ("O&C lands") were originally part of the public domain which Congress granted to the Oregon and California Co. pursuant to the Act of July 25, 1866 (14 Stat. 239) to build a railroad and to the Coos Bay Wagon Road Co. pursuant to the Act of Mar. 3, 1869 (Stat. L., XV 340–341) to build a wagon road. The grant was subject to conditions which were later determined by the Supreme Court to have been violated, and Congress ordered title revested in the United States.[73]

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[69] My conclusion is shared by the commentators. For example:

> "[The Executive Order's] purposes are clearly stated: Investigation, eamination and classification. There is no mention of water, and, more significantly, none of oil shale development. The language of the order cannot support a conclusion that development was intended and it cannot be inferred from the mere act of withdrawal as is possible for the oil shale reserves. Thus the argument that all federal oil shale lands carry with them their own protected water supply, intriguing though it may be, must fail."

Holland, "Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Development," 52 Denver L. Rev. 657, 688 (1975).

[70] 43 U.S.C. § 315 *et seq.* (1976).

[71] 43 U.S.C. § 315a (1976).

[72] 43 U.S.C. § 315 (1976).

[73] In 1908, Congress authorized the Attorney General to file suit against the Oregon and California Railroad Co. for forfeiture of its unsold indemnity lands for violation of an enforceable covenant. The U.S. Supreme Court found for the United States, and remanded the case to Congress for a legislative solution. *Oregon and California R.R. Co. v. U.S.*, 238 U.S. 393 (1915). Congress responded by passing the Act of June 16, 1916 which paid the Railroad Company $2.50 for each acre of land it was entitled to because of actual construction and revested in the United States title to all land which had been unsold prior to July 1, 1913. In the same 1908 resolution authorizing suit against the Oregon and California Railroad Co. for recovery of its grant, Congress authorized suit against the Coos Bay Wagon Road Co. upon the same grounds. In 1919, while the Company was awaiting appeal to the U.S. Supreme Court after losing

Congress directed that those lands "classified as timber lands, and powersite lands valuable for timber," should be managed "for permanent forest production." [74]

I am of the opinion that the revesting of these lands in the United States did not effect a formal reservation of these lands for which the United States may claim a reserved water right, nor did the "O&C" Act do anything more than provide (as did the Taylor Grazing Act) how these lands were to be managed. There are therefore no reserved water rights on "O&C" lands.

7. *The Classification and Multiple Use Act of 1964*

The Classification and Multiple Use Act of 1964 [75] provided a system for classifying which public lands were to be disposed of under applicable public land laws and which were to be retained for interim multiple use management.[76] The Act was to be "consistent with and supplemental to the Taylor Grazing Act of June 28, 1934," [77] and its purposes were declared to be "supplemental to the purposes for which public lands have been designated, acquired, withdrawn, reserved, held, or administered." [78]

Since I have determined that the Taylor Grazing Act did not effect the reservation of any water, finding a reservation of water in any classification under the Classification and Multiple Use Act would clearly be inconsistent with the Taylor Grazing Act. Therefore, lands classified under that Act do not have reserved water rights.

8. *Wild Horse Ranges*

The Act of Dec. 15, 1971,[79] authorizes and directs the Secretary "to protect and manage wild free-roaming horses and burros as components of the public lands" and furthermore provides that he "may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation." [80] The Act does not authorize the withdrawal or reservation of public lands for these ranges, but says that such lands are to be "principally" devoted to providing for the welfare of the wild horses and burros.

It is clear that the animals sought to be protected by this Act need drinking water, but the mere

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in the federal district court, Congress authorized dismissal of the suit and payment to the Company for its interests in the lands upon reconveyance to the United States (40 Stat. 1179–1180). The money paid the Company was the maximum which Congress intended the Company should derive from its original grant.

[74] 43 U.S.C. § 1181 *et seq.* (1976).

[75] U.S.C. § 1411 *et seq.* (1970).

[76] This Act expired of its own terms in 1970. *See* 43 U.S.C. § 1418 (1976).

[77] 43 U.S.C. § 315 (1976).

[78] 43 U.S.C. § 1416 (1970).

[79] 16 U.S.C. § 1333 *et seq.* (1976).

[80] "Range" is defined by the Act, 16 U.S.C. § 1332(c) (1976), as follows:
"[T]he amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands."

designation of such sanctuaries does not effect a reservation of water for the purpose of wild horse and burro drinking.

9. *Wild and Scenic Rivers*

The Bureau of Land Management administers some of the components of the Wild and Scenic Rivers System.[81] The designation of a river as a wild, scenic or recreational river under this Act explicitly reserves sufficient unappropriated water to fulfill the purposes of the Act.[82] The scope and purposes of the reserved water rights for these rivers are discussed at part VII *infra*, and will therefore not be repeated here.

10. *The Federal Land Policy Management Act (FLPMA)*

Nothing in the Federal Land Policy and Management Act establishes a reserved right on BLM lands other than those discussed above. In particular, sec. 701(g) of FLPMA, notes to 43 U.S.C. § 1701 (1976), provides in pertinent part as follows:

> Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—
>
> (1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;
>
> (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; [83]

By neither expanding nor diminishing either state *or* federal power, this provision maintains the *status quo* with respect to water rights on the public lands.

V. *RESERVED WATER RIGHTS APPLICABLE TO AREAS ADMINISTERED BY THE NATIONAL PARK SERVICE*

The National Park Service (NPS) administers a variety of lands collectively known as the National Park System:

> The "national park system" shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes. [84]

The following subsections describe the reserved water rights that may be claimed for components of the National Park System under existing precedent.

A. *National Parks*

1. *Pre–1916 National Parks*

The concept of national parks is an American invention. In the period prior to 1916, the early national parks such as Yellowstone (1872), Sequoia (1890), Mount Rainier (1899), and Crater Lake (1902), were established by legislation us-

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[81] The Wild and Scenic Rivers Act, Oct. 2, 1968, 82 Stat. 906, 16 U.S.C. §§ 1271–1287 (1976). *E.g.*, Rio Grande River, New Mexico; Snake River, Idaho and Oregon; Flathead River, Montana; American River, California.

[82] 16 U.S.C. § 1284(c) (1976).

[83] This provision was contained in the Senate version of the bill and adopted by the conferees without debate or explanation as to its meaning.

[84] Sec. 2(a), Act of Aug. 18, 1970, 84 Stat. 826, 16 U.S.C. § 1c (1970). The inclusion of "water" in the definition of the National Park System clarifies congressional intent that NPS has jurisdiction over activities relating to water areas within system boundaries. *See United States* v. *Brown*, 552 F. 2d 817 (8th Cir. 1977), *cert. denied* 431 U.S. 949 (1977); *United States* v. *Carter*, 339 F. Supp. 1394 (D. Ariz. 1972); 16 U.S.C. § 1a–2(h) (1970).

ing nearly identical "purpose" language:

> [Yellowstone was] * * * dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people * * *.
>
> * * * * * *
>
> [The Secretary of the Interior] * * * shall make regulations providing for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes * * * for the accommodation of visitors. He shall provide against the wanton destruction of the fish and game found within the park * * * and generally is authorized to take all such measures as may be necessary or proper to fully carry out the objectives and purposes of this section. [85]

These statutes state that the reservation for park purposes includes the preservation of natural resources and natural curiosities, and public enjoyment thereof. In *United States* v. *New Mexico*, *supra* at 709–11, the Court intimated in *dictum* that the early park legislation's express concern for the natural curiosities and biotic elements would allow the assertion of reserved water rights required to fulfill such purposes. *But see id.*, *at* 711, fn. 19. Like the 1916 Act discussed below, these broadly articulated purposes support a variety of reserved water rights, both consumptive and non-consumptive, and the priority date for such claims is the pre-1916 date of each area's enabling legislation.[86]

2. *The National Park Service's Organic Act of 1916*

When the early parks and monuments were established, there was little coordination of policy and no continuity of personnel. The National Park Service's 1916 organic act provided a centralized administration, and contains an enduring statement of purpose.

> The service thus established shall promote and regulate the use of * * * national parks, monuments, and reservations hereinafter specified * * * by such means and measures as conform to the *fundamental purpose* of said parks, monuments, and reservations, which *purpose* is *to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.*[87] (Italics added.)

This statement of fundamental purpose encompasses a variety of consumptive and non-consumptive reserved water rights necessary to conserve scenic, natural, historic and biotic elements and to provide

[85] Act of Mar. 1, 1872, 17 Stat. 32–33, 16 U.S.C. §§ 21, 22 (1970); *see also* Act of Sept. 25, 1890, 26 Stat. 478, 16 U.S.C. §§ 41, 43 (1970) (Sequoia); Act of Mar. 2, 1899, 30 Stat. 993, 16 U.S.C. §§ 91–93 (1970) (Mount Rainier); Act of May 22, 1902, 32 Stat. 202, 16 U.S.C. §§ 121, 123 (1970) (Crater Lake).

[86] The specific reserved water rights applicable to these pre-1916 National Parks are the water rights described below in subsec. 2, supplemented by any additional reservation purposes stated in the individual park enabling legislation. See part V B. 2., below, on the "relationback" provisions of 16 U.S.C. § 1 (1970) to pre-1916 National Parks.

[87] Act of Aug. 25, 1916, § 1, 39 Stat. 535, *as amended*, 16 U.S.C. § 1 (1970).

for sustained public enjoyment thereof.

I conclude that the particular reserved water rights for national park areas encompassed under 16 U.S.C. § 1 include water required for:

1. *Scenic, natural and historic conservation uses*, such as: ecosystem maintenance (*e.g.*, protecting forest growth and vegetative cover, watershed protection, soil and erosion control, lawn watering, fire protection), maintenance of water-related aesthetic conditions (*e.g.*, minimum stream flows and lake levels), and maintenance of natural features (*e.g.*, wilderness protection, geysers, waterfalls).

2. *Wildlife conservation uses*, such as: the protection, reproduction and management of migratory wildlife and birds (*e.g.*, wildlife and bird watering, habitat maintenance, irrigation for hay and other food staples); and the protection, reproduction and management of fish and other aquatic life (*e.g.*, minimum stream flows and lake levels).

3. *Sustained public enjoyment uses*, such as: visitor accommodation uses through NPS and concessioner operations (*e.g.*, campground uses and maintenance, hotel water and sewer uses), public facility uses (*e.g.*, water fountains, sewage), visitor activities (*e.g.*, visitor centers, park office, shop uses) and visitor enjoyment of the scenic, natural, historic and biotic park resources (*e.g.*, trail maintenance, minimum stream flows and lake levels for water-borne public enjoyment and recreation, hay and watering of horses and mules used by park visitors).

4. *NPS personnel uses* to provide the above uses, such as domestic uses (ranger stations, NPS residences), NPS animal maintenance (*e.g.*, hay and watering of NPS horses and mules).

These enumerated reserved water rights uses for national parks are largely consistent with the Master-Referee and Colorado district court's decree in the *Colorado 4, 5, and 6* litigation, *supra*.[38] My con-

[38] The *Colorado 4, 5, and 6* decree found fourteen types of water uses to be within the reserved water rights ambit of 16 U.S.C. § 1 (1970). The decree is consistent with my conclusions in all but the following two respects.

First, the Master-Referee concluded that only concession uses operated by the United States receive reserved water rights. In my view, the 1916 Organic Act clearly envisioned permit and lease concession agreements to provide for accommodation of visitors in parks. Moreover, subsequent congressional action has reenforced the concept that the concession system is the preferred means for providing facilities for public enjoyment of the parks, in furtherance of the fundamental purpose of 16 U.S.C. § 1 (1970). *See* 16 U.S.C. §§ 20, 20a (1970). Since providing for sustained public enjoyment is one of the fundamental purposes for park reservations under 16 U.S.C. § 1, and the concession system is the congressionally favored method for effecting that fundamental purpose, I conclude that concession uses obtain reserved water rights.

Second, though the Master-Referee appeared to acknowledge reserved water rights for necessary stream flows to permit public water-borne enjoyment and recreation in parks, the Colorado district court held that recreational boating was not a fundamental purpose for park reservations under 16 U.S.C. § 1. *In the Matter of the Application for Water Rights of the United States of America, Water Divisions 4, 5, and 6*, 2–6 (Opinion of Colorado Water Judge Stewart, Oct. 2, 1978). This holding is internally inconsistent with the recognition of reserved water rights for land-based public enjoyment and recreation

clusions on national park reserved water rights are also consistent with the Supreme Court's holding in *New Mexico*, *supra*. As recognized in that decision, any doubt about the breadth of park system purposes and the concomitant reserved water rights, is resolved by comparing the narrower utilitarian purposes for which national forests were reserved under the 1897 Act. *United States v. New Mexico*, *supra*, *at* 709–11. The consistency of my conclusions on national park reserved water rights with *New Mexico* can also be seen from the post-*New Mexico* Colorado district court opinion in *Colorado 4, 5, and 6* (Judge Stewart, Oct. 2, 1978) which did not substantially alter national park reserved water rights in light of *New Mexico*.

The above-defined reserved water rights uses are all intimately related to the fundamental purpose for park reservations, as articulated in 16 U.S.C. § 1 (1970). Thus, I conclude that the above-defined water uses for parks fall within the fundamental purpose for park reservations, and accordingly receive reserved water rights under the reserved water rights doctrine as recently reiterated in the *New Mexico* decision.

The purposes stated in the 1916 Organic Act attach to all "national parks" created prior to 1916 by virtue of the statutory reference to "national parks" in the general sense. The above-defined reserved water rights carry a priority date as of the date of the individual park's enabling legislation.

3. *Post-1916 Acts*

The post–1916 Acts establishing new national parks generally state that park protection and administration will be pursuant to the 1916 organic act. *See* for example 16 U.S.C. § 80d (1976) (King's Canyon National Park), 16 U.S.C. § 90c (1976) (North Cascades National Park), and 16 U.S.C. § 158 (1976) (Big Bend National Park). In any event, 16 U.S.C. § 1 (1970) would be applicable to these subsequent national park units by virtue of its inclusive "national parks" language. Therefore, the purposes outlined in the 1916 Act constitute stated purposes for the individual post-1916 reservations and the reserved water rights described above attach as of the date of an individual park's enabling legislation. Moreover, it is possible that the individual park's enabling statutes may state additional purposes not

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(*e.g.*, maintenance of hiking trails, campgrounds, hay and watering of animals used to enjoy parks). The public enjoyment of certain scenic, natural, historic and biotic park resources can best be obtained through water-borne public enjoyment and recreation (*e.g.*, canoeing, rafting, boating), rather than through land-based public enjoyment and recreation (*e.g.* hiking, horseback riding). Thus, I conclude that water-borne public enjoyment and recreation is a fundamental purpose for park reservations under 16 U.S.C. § 1 (1970), and that necessary minimum stream flows and lake levels for public enjoyment and recreation may be claimed under the reserved water rights doctrine for national parks.

encompassed by the 1916 Act for which reserved rights may attach.

Congress has taken no action subsequent to 1916 to negate the implied intent contained in the Organic Act that all unappropriated waters necessary to fulfill the purposes of the national parks are reserved as of the date of the enabling legislation. General post-1916 legislation reinforces the principles of federal control over water and paramount protection of park resources. For example, the Act of Mar. 3, 1921, 41 Stat. 1353, 16 U.S.C. § 797a (1970), prohibits licensing of water projects within parks and monuments without the specific authority of Congress. The 1921 Act reaffirms the principle of the 1916 Organic Act that park waters should be reserved for conservation and public enjoyment purposes, and not allocated for conflicting federal (and by implication, state or private) purposes. Moreover, recent legislation confirms the high public value of national parks and provides that actions taken in derogation of park values and purposes shall not be authorized unless specifically directed by Congress.

> Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in * * * [16 U.S.C. § 1c], shall be consistent with and founded in the purpose established by * * * [16 U.S.C. § 1], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.[89]

The purpose of this provision is to ensure that the resources and values of areas in the National Park System are afforded the highest protection and care in governmental decisions. H.R. Rep. No. 95-581, 95th Cong., 1st Sess. 21, 96, 108 (1977); S. Rep. No. 95-528, 95th Cong., 1st Sess. 9, 13-14, 20 (1977). This provision reinforces my conclusion that Congress, by the 1916 Act and other enabling legislation, intended to reserve unappropriated waters necessary to accomplish park purposes, in order to protect the "high public value" of national parks that might otherwise be lost by less secure water rights.

In addition to reserving water rights, the National Park Service is also authorized to acquire water rights in accordance with state law. The Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2(g) (1970), authorizes appropriations to the National Park Service for the:

> Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments.[90]

[89] Act of Mar. 27, 1978, § 101(b), 92 Stat. 166, 16 U.S.C.A. § 1a-1 (West Supp. 1979).

[90] This provision was intended to clarify the Service's basic authority to investigate, establish, and acquire water rights, so as to

I do not view the 1946 Act as inconsistent with the principle that, when park lands were set aside, the Congress also intended to reserve the unappropriated waters appurtenant to such lands necessary to accomplish park purposes. The reference to establishing water rights in accordance with court decisions should be read to include authority to establish reserved water rights under applicable Supreme Court decisions. The 1946 Act grants discretionary authority [91] to the NPS to obtain water in compliance with state law and to purchase valid, existing water rights, when it is in the government's best interest to do so (*e.g.*, if there are not sufficient amounts of unappropriated water available to fulfill park purposes when a park is established). I also view this statute, as apparently does the Supreme Court in the *New Mexico* case, *supra*, at 702, as authorizing the NPS to acquire water rights to carry out *secondary* uses which may be permitted in park areas, but are by definition not among the purposes for which the parks are created. These conclusions are compatible with the provision's scant legislative history.

B. *National Monuments*

The Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. §431 *et seq.*, (1976), empowers the President to proclaim national monuments on lands owned or acquired by the Federal Government containing historic landmarks, historic or prehistoric structures, or other objects or historic or scientific interest, and to reserve adjacent federal lands for the proper care and management of the protected objects. It is well settled that reserved water rights may attach to national monuments. *Cappaert*, *supra*.

1. *Pre-1916 National Monuments*

Between 1906 and 1916, the President acted several times to create national monuments. *See, e.g.*, Proc. 658, 34 Stat. 3236 (Devil's Tower National Monument); Proc. 697, 34 Stat. 3266 (Petrified Forest Na-

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avoid points of order to appropriation bills. H.R. Rep. No. 2459, 79th Cong., 2d Sess. 2 (1946). When originally introduced, this provision contained no reference to state or local law. The reference was added, however, at the suggestion of the Committee on Public Lands. 92 Cong. Rec. 9103 (1946). There was no discussion of the underlying reason or need for this amendment on the House floor or in the House Committee Report.

[91] The 1946 Act is readily distinguishable from sec. 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1976), construed in *California v. United States*, *supra*, to require federal deference to both substantive and procedural state water laws for the appropriation and distribution of federal reclamation project water, except where inconsistent with congressional directives. Sec. 8 provides:

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *."

Unlike the general discretionary authority of the 1946 Act, the specific and mandatory language of sec. 8 evidences a clear congressional intent to defer to state law in securing of federal water rights.

tional Monument). The proclamations establishing these early national monuments are brief, generally citing the statutory language, naming the landmarks, structures or other objects to be protected, stating that the "public good would be promoted" by the reservation, and giving a land description.

Clearly the proclamations intended to reserve such water as necessary to provide for the proper care and management of the stated landmarks, structures, or objects of historic or scientific interest, the *raison d' etre* for the reservation. It is less clear, however, whether the early proclamations also reserved water rights for the protection of other unstated elements of the national monuments (*e.g.*, biological resources) and for their public enjoyment.

In the *Colorado 4, 5, 6* litigation, *supra*, the Master-Referee and Colorado district court approved a decree granting broad reserved water rights for the Colorado National Monument's unstated objects and public enjoyment thereof, carrying a priority date of 1911. This holding is supported by the view that the promotion of the public good is a primary purpose of the monument reservation and that it includes public enjoyment of both stated and unstated monument objectives. Moreover, the holding is supported by the view that the 1916 National Park Service Organic Act, discussed below, merely confirmed the purposes for which national monuments have always been reserved. Finally, the 1911 priority date for reserved water rights in conserving objects not expressly covered until the 1916 Act is supported by a "relation-back" theory in *Arizona v. California*, *supra* (Lake Mead National Recreation Area given priority dates of 1929 and 1930 when executive orders withdrew lands "pending determination as to the advisability of including such lands in a national monument," though no national monument was created and Lake Mead National Recreation Area purposes were not expressly stated until 1964), and *United States v. Walker River Irrigation District*, 104 F. 2d 334 (9th Cir. 1939) (where an Indian reservation was given an 1859 priority date when the Indian Commissioner suggested a reservation, though the tract was not formally reserved until 1874). This "relation-back" theory is not inconsistent with the *New Mexico* Court's view of the effect of the 1960 Multiple Use-Sustained Yield Act on national forests, since that statute indicated that the additional purposes were supplemental and subsidiary to the 1897 Organic Act purposes, while the 1916 Act merely confirmed the "fundamental purpose" for which national monuments have always been reserved. Thus, I conclude that pre-1916 national monuments receive the reserved water rights discussed above in the national park context, carrying a priority date of the date of the establishing presidential proclamation.

2. Effect of the 1916 National Park Service Organic Act

With the passage of the 1916 National Park Service Organic Act, the purposes of national monuments were explicitly stated for the first time:

> [T]he fundamental purpose of said * * * monuments * * * is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. [16]

As previously developed in the national park context, this statement of "fundamental purpose" incorporates the reserved water rights described above which are necessary for scenic, natural, historic and biotic conservation, and sustained public enjoyment thereof. My conclusions on reserved water rights applicable to national monuments were also substantially confirmed in the *Colorado 4, 5, and 6* litigation, where thirteen types of reserved water rights were decreed. The priority date for reserved water rights is the date of the presidential proclamation establishing the national monument reservation. *Cappaert, supra.*

C. Other Areas Administered by the National Park Service

In addition to traditional national parks and national monuments, the National Park Service administers a variety of other areas, such as: national historical parks, national memorial parks, national memorials, national military parks, national battlefields, national historic sites, national seashores, national rivers, national scenic riverways, national scenic trails, national lakeshores, national recreation areas, national parkways and national preserves.

By use of the term "reservation," the general purposes stated in section 1 of the 1916 Act, 16 U.S.C. § 1 (1970), are also applicable to these other areas administered by the National Park Service. Notwithstanding its general applicability, 16 U.S.C. § 1 is almost always reiterated expressly in the authorizations for these other specific system areas. *See*, for example, 16 U.S.C. §§ 245, 264, 459a–1, 460a–2, 460m–5, 460m–12, 460s–5, and 460bb–3 (1976). The general applicability of the 1916 Act was confirmed by the passage of section 2 of the Act of August 18, 1970, 84 Stat. 826, 16 U.S.C. § 1c (1970), which defines the National Park System and expressly makes the Service's general authorities, including the 1916 Act, applicable to all areas of the System to the extent not in conflict with any individual area's specific enabling legislation. The underlying commonality of purpose of these various areas served as a rationale for the 1970 Act. H.R. Rep. No. 91–1265, 91st Cong., 2d Sess. 2 (1970).

[16] 16 U.S.C. § 1 (1970).

As a general rule, I conclude that the earlier stated fundamental purposes of 16 U.S.C. § 1 (1970) and resultant reserved water rights apply to these various components of the National Park System, with a priority date as of the establishing statute's enactment. The extent to which particular reserved water rights are applicable to a given area must be determined on a case-by-case basis, involving an interpretation of both 16 U.S.C. § 1 (1970) and the establishing legislation.

VI. *RESERVED WATER RIGHTS IN AREAS ADMINISTERED BY THE FISH AND WILDLIFE SERVICE*

The Fish and Wildlife Service (FWS) administers a number of areas to which reserved water rights may properly be ascribed. *Arizona v. California*, *supra*, at 601. Most of these areas are now components of the National Wildlife Refuge System (hereinafter "NWRS"), which consists of:

> [A]ll lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas * * *. [[86]]

The consolidation of management authorities created by the National Wildlife Refuge Administration Act of 1966, is of recent origin, as compared to the organic authorities for the Forest Service (1897) and the NPS (1916). Unlike the other organic authorities, the National Wildlife Refuge Administration Act does not authorize the reservation of lands of explicitly define the purposes of the NWRS. Prior to 1966, NWRS components were reserved pursuant to an array of individual statutes, executive orders and secretarial public land orders, making these authorities the primary sources for delineating the purposes for which reserved water rights may attach. This part sets forth generic "purposes" for public domain reservations administered by the Fish and Wildlife Service, which may be used in quantifying reserved water rights.

A. *Executive Refuge Reservations Prior to the Migratory Bird Conservation Act*

Prior to the enactment of the Migratory Bird Conservation Act in 1929, the reservation of land for fish and wildlife purposes took place through Executive action and without any organic legislation defining the purposes for the reservation. Under the "specific purpose" test formulated by the *New Mexico* Court, it appears that reserved water rights attach only to the extent necessary to fulfill the purposes or objectives named in the individual executive orders establishing the reservations. These executive orders are similar in structure, utilizing succinct language to establish preserves for species groups.

In the pre-1910 period, "refuge" reservations were created by the President's implied power under Article II, section 1 of the Constitu-

[86] National Wildlife Refuge System Administration Act of 1966, 80 Stat. 927, 16 U.S.C. § 668dd (1970).

tion, subsequently upheld in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). By 1910, 44 executive orders had established bird reserves. 42 House Doc. 93 (1908); 43 House Doc. 44 (1909). These executive orders generally stated that the identified tract was: "hereby reserved and set apart for the use of the Department of Agriculture as a preserve and breeding ground for native birds." [94]

For the native bird reserves, I infer an intent to reserve sufficient water needed for native bird breeding and the maintenance of native bird [95] populations (*e.g.*, ecosystem food supply, fire protection, domestic needs of FWS personnel) on the reservation, since this was the stated reason for the creation of the preserves.

After 1910, the Executive branch also had the delegated authority of the Pickett Act, 36 Stat. 847, 43 U.S.C. §§ 141, 142 (1970) to rely on in creating fish and wildlife reservations for "public purposes." The later executive orders are equally succinct in their language, merely reserving areas as an "elk refuge" (Exec. Order No. 1814, Aug. 25, 1913), "preserves and breeding ground for muskrat and beaver" (Exec. Order No. 4592, Feb. 21, 1927), "breeding ground for wild animals and birds" (Exec. Order No. 5316, Apr. 3, 1930), or similar purpose language. For these and similar executive order reserves, I infer an intent to reserve sufficient water needed for the maintenance of the species (*e.g.*, ecosystem food supply, breeding habitat, fire protection, domestic needs of FWS personnel) mentioned in the executive orders establishing the individual reservations.

These early reservations carry the date of the establishing executive order as the priority date for reserved water rights. Many of these executive order reservations have been subsequently expanded in geographical area and in named purposes by Executive action and legislation. These new purposes and areas carry priority dates as of the date of the expanding legislation or Executive action.

B. *Executive Order Reserves Created to Fulfill the Purposes of the Migratory Bird Conservation Act*

As originally written, the 1929 Migratory Bird Conservation Act (hereinafter "MBCA"), 45 Stat. 1222, provided for the acquisition of

[94] *See* Exec. Order Nos. 857B–D (Oct. 10, 1905), 703–705 (Oct. 23, 1907), and 1041 (Feb. 27, 1909). [Note: The functions of the Secretary of Agriculture relating to the conservation of wildlife, game and migratory birds were transferred to the Secretary of the Interior by the 1939 Reorganization Plan II and are now under the administrative jurisdiction of the Fish and Wildlife Service.]

[95] Prior to the Migratory Bird Treaty Act, all of wild birds were considered "native" in the sense of being subject to regulation by the states to the exclusion of the Federal Government. *Compare Geer v. Connecticut*, 161 U.S. 519 (1896) (recently overruled by the Supreme Court in its Apr. 24, 1979 opinion in *Hughes v. Oklahoma*), with *Missouri v. Holland*, 252 U.S. 416 (1920). Accordingly, I conclude that the term "native birds" means "all wild birds frequenting the area, whether or not they inhabited the area on the date of the reservation."

"lands, waters and interests therein" to be administered "as inviolate sanctuaries for migratory birds." Additionally, many refuges were reserved from the public domain to more fully effectuate the purposes of the MBCA.

The executive orders reserving such refuges appear to be of two styles, a pre-1939 version which specifically cites the MBCA purposes and post-1939 version which generally cites migratory bird and wildlife refuge purposes.

1. *Pre-1939 language:*

[T]o effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * * [there is] hereby reserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife. Exec. Order No. 7926, 3 CFR 355 (1938–1943 Comp.).

2. *Post-1939 language:*

[R]eserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife. Exec. Order No. 8647, 3 CFR 864 (1938–1943 Comp.).

It is clear that either style of executive order creates reserved water rights to the extent "reasonably necessary to fulfill the purposes of the Refuge," since the second style language comes from Havasu Lake National Wildlife Refuge given such water rights in *Arizona v. California*, *supra*. Though the *Arizona* Court did not focus on purposes for the reservation, but rather on demonstrable management needs in determining the quantity of reserved water rights, subsequent refinements of the reserved water right doctrine would appear to limit such needs to the extent needed for the specific purposes of maintaining "a refuge and breeding ground for migratory birds and other wildlife." Such reserved water rights include consumptive and non-consumptive water uses necessary for the conservation of migratory birds and other wildlife (*e.g.*, watering needs, habitat protection, ecosystem food supply, fire protection, soil and erosion control) and attendant FWS personnel needs (*e.g.*, refuge staff domestic needs). These reserved water rights carry the priority date of the establishing executive order.

C. *Refuges Created by Statute*

In addition to refuges created by Executive action, several refuges have been created or explicitly authorized by statute, largely within national forest boundaries. *See* 16 U.S.C. §§ 671–697a (1976).[26] These statutory refuges obtain reserved water rights in waters unappropriated as of the date of enactment necessary to fulfill stated refuge purposes.

D. *Game Ranges Created by Executive Order*

In addition to establishing the native bird preserves, migratory bird sanctuaries and wildlife refuges described earlier, executive orders have also established game ranges. The language of these executive orders is nearly identical in

[26] In *New Mexico*, *supra*, the Supreme Court at least intimated that minimum stream flows could be claimed for fish and game sanctuaries reserved within national forests. *See* 16 U.S.C. § 694 (1970). However, the Court expressly refrained from reaching the question of what, if any, water Congress reserved under that statute. *New Mexico*, *supra*, at 711, fn. 19.

terms of purposes for the reservations.

> [T]hey are hereby, withdrawn and reserved and set apart for the conservation and development of natural wildlife resources and for the protection of and improvement of public grazing lands and natural forage resources * * * [27]

It is reasonable to presume an intent to reserve water necessary for the conservation and development of wildlife, grazing and forage resources on these game ranges (*e.g.*, irrigation, ecosystem food supply, breeding habitat, fire protection, erosion control), which are under the jurisdiction of the Fish and Wildlife Service. *See* 43 FR 19045, 19046 (May 3, 1978).

E. *Refuges Superimposed on Existing Withdrawals*

The Executive Branch has also reserved lands for refuge purposes within areas previously withdrawn for power site, reclamation or other purposes. These layered withdrawals were undertaken largely to mitigate fish and wildlife impacts resulting from development, in accordance with the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*

Pertinent examples include:

1. John Day Wildlife Management Area—"reserved for the John Day Wildlife Management Area of the John Day Lock and Dam Project" (a Corps of Engineers Project). Public Land Order No. 4210, Apr. 24, 1967 (32 FR 6643, Apr. 29, 1967).

2. Havasu Lake National Wildlife Refuge—"reserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife * * * [the land] reservation is subject to their use for the purposes of the Parker Dam Project." Executive Order No. 8647, Jan. 22, 1941 (6 FR 593, Jan. 25, 1941).

These refuges share the common feature of being subject to use under earlier withdrawals.

I conclude that these refuges do obtain reserved water rights for refuge purposes (*e.g.*, habitat maintenance, watering needs, etc.), carrying a priority date as of the date of reservation for refuge purposes. Superimposed refuge reservations, such as the Havasu Lake National Wildlife Refuge, received reserved water rights in *Arizona* v. *California*, 373 U.S. 546, 601 (1963); 376 U.S. 340, 346 (1964). The fact that such refuges are subject to another withdrawal is a distinction without a difference. *United States* v. *New Mexico*, *supra*, continued the traditional rule of the reserved water rights doctrine that water is implicitly reserved to the extent necessary to fulfill the "specific" or "direct" purposes of the reservation. Since the self-evident purpose

[27] Exec. Order No. 8039, 3 CFR 447 (1938–1943 Comp.) (Kofa Game Range, Jan. 25, 1939); Exec. Order No. 7509, 3 CFR 227 (1936–1938 Comp.) (Fort Peck Game Range, Dec. 11, 1936); Exec. Order No. 8038, 3 CFR 446 (1938–1943 Comp.) (Cabeza Prieta Game Range, Jan. 25, 1939).

of these reservations was to create a refuge offering a measure of protection to wildlife, these reservations would obtain reserved water rights necessary for refuge management purposes under existing precedent.

F. *Other Refuges, Wildlife Management Areas and Waterfowl Production Areas Created by Executive Order*

In addition to refuge reserved in accordance with the Migratory Bird Conservation Act or reserved on existing withdrawals, other components of the National Wildlife Refuge System have been reserved by Executive action. Pertinent examples include:

1. Seedskadee National Wildlife Refuge—"reserved for the Seedskadee National Wildlife Refuge." Public Land Order No. 4834, May 20, 1970 (35 FR 8233, May 26, 1970).

2. Sunnyside Wildlife Management Area—"reserved for management in cooperation with the State of Nevada Sunnyside Wildlife Management Area * * * [under cooperative agreement] the State of Nevada is authorized to manage the withdrawn lands for the conservation of small game and waterfowl." Public Land Order No. 3441, Aug. 21, 1964 (29 FR 12233, Aug. 27, 1964).

3. Gila River Waterfowl Area—"reserved under the jurisdiction of the Interior Department for use by the Arizona Game and Fish Commission in connection with the Gila River Waterfowl Area Project." Public Land Order No. 1015, Oct. 1, 1954 (19 FR 6477, Oct. 7, 1954).

I conclude that such public domain reservations for refuge, wildlife management or waterfowl production purposes obtain reserved water rights necessary to fulfill stated purposes. The priority date for these reserved water rights is the date of reservation.

G. *The Impact of the Refuge Receipts Act, the Refuge Recreation Act and the National Wildlife Refuge Administration Act*

The Refuge Receipts Act of 1935, 49 Stat. 383, 16 U.S.C. § 715s(f) (1970), provides for the disposition of receipts from various activities (sale and lease of animals, timber, hay, grass, soil products, minerals, shells, gravel, public accommodations) that Congress recognized were carried out on refuges. Under the specific purpose test of *New Mexico*, *supra*, these uses would not be accorded reserved water rights.

The Refuge Recreation Act of 1962, 76 Stat. 653, 16 U.S.C. §§ 460k–1 and 460k–4 (1976), provides a congressional directive that refuge areas and fish hatcheries be managed for public recreation where compatible with the primary purposes for which such areas were acquired or established. Since such recreational uses are not a specific purpose for establishing refuges and fish hatcheries, recreational uses would obtain no reserved water rights under *New Mexico*.

As developed earlier, the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (1976), applies to:

> [A]ll land, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas * * *. [16 U.S.C. § 668dd(a)(1)]

This includes the areas discussed in subsections A–F of section VII. While the Act does not appear to establish any new purposes for the new National Wildlife Refuge System, this consolidating statute did confirm that public recreational use and accommodations are subsidiary or secondary uses of wildlife refuges:

> (1) The Secretary is authorized, under such regulations as he may prescribe, to—
>
> (A) permit the use of any area within the System for * * * *public recreation and accommodations*, and access *whenever* he determines that such uses are *compatible with the major purposes* for which such areas were established. [Italics added.] [98]

Thus, reserved water rights for public recreational use and accommodations within the Refuge System would not be allowed under existing legal precedent, since they are not direct purposes for reserving the land, but rather allowable secondary uses. *See United States v. New Mexico*, *supra*, at 3015.

[98] 16 U.S.C. § 668dd(d) (1970).

H. *Fish Hatcheries Created Pursuant to Executive Action*

The Fish and Wildlife Service manages fish hatcheries in addition to the National Wildlife Refuge System. The public land orders reserving such fish hatcheries generally state that the areas are "reserved and set apart * * * for fish-cultural purposes" or that the area is "reserved for use * * * [as a] Fish Cultural Station." *See* Public Land Order No. 617, Nov. 26, 1949 (14 FR 7295, Dec. 6, 1949); Public Land Order No. 1941, Aug. 12, 1959 (24 FR 6713, Aug. 19, 1959). I am of the opinion that these public land orders reserved sufficient unappropriated water for fish-cultural purposes. Since fish hatcheries generally lie at the headwaters of streams, these largely non-consumptive water uses should not adversely affect other uses.

VII. *NATIONAL WILD AND SCENIC RIVERS SYSTEM*

The Wild and Scenic Rivers Act, 82 Stat. 906, 16 U.S.C. §§ 1271–1287 (1976), contains an express, though negatively phrased, assertion of federal reserved water rights:

> *Designation* of any stream or portion thereof as a national wild, scenic or recreational river area *shall* not *be construed as a reservation of the waters of such streams for purposes* other than those specified in this chapter, or *in quantities* greater than *necessary to accomplish these purposes.* [99]

[99] Sec. 13(c) of the Act, 82 Stat. 917, 16 U.S.C. § 1284(c) (1970) (italics added). The

The legislative history of the Wild and Scenic Rivers Act emphasizes the congressional intent to reserve unappropriated waters necessary to fulfill the Act's purposes. In explaining the conference report on the Senate floor, Senator Gaylord Nelson, a principal sponsor and floor manager of the bill in the Senate, read the following sectional analysis:

> Enactment of the bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill. [100]

Thus, the intent to reserve unappropriated waters at the time of river designation is clear and the remaining question is the scope of the reserved water right. The previously quoted excerpt suggests that the scope question is to be resolved by examining the purposes of the Act, limited by protecting those features which led to a particular river's designation. The purposes of the Act were to implement the policy section (*see* 16 U.S.C. § 1272 (1970)). The policy reads in pertinent part:

> It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. [101]

It is my opinion that the extent of the water reserved is the amount of unappropriated waters necessary to protect the particular aesthetic, recreational, scientific, biotic and historic features ("values") which led to the river's inclusion as a component of the National Wild and Scenic Rivers System, and to provide public enjoyment of such values.

The required congressional reports for additions to the System will be a fruitful source for determining which features led to the river's designation and, hence, the volume of instream flow and consumptive use intended to be reserved. *See* 16 U.S.C. § 1275 (1970). For these later added national wild and scenic rivers, it appears that the date Congress formally declares the river to be a wild and scenic river

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preceding subsec., 16 U.S.C. § 1284(b), provides: "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."

The meaning of this provision is difficult to discern, especially in light of Congress express invocation of the reserved water rights doctrine in the next subsection. Even without considering sec. 1284(c), no consistent reading of this provision appears possible. Giving literal effect to the "no implied claim * * * as to exemption from State water laws" phrase, denies the literal effect of the "no express or implied * * * denial * * * as to exemption from State water laws" phrase, and vice versa. There is no clarifying legislative history. I therefore must conclude that the provision is a *non sequitor* roughly designed to preserve the *status quo* of federal-state relations in water law under "established principles of law," including the reserved water rights doctrine. 16 U.S.C. § 1284(b).

[100] 114 Cong. Rec. 28313 (Nov. 26, 1968); *see also* 114 Cong. Rec. 26494 (Sept. 12, 1968); 13 Cong. Rec. 21747–48 (Aug. 8, 1967); S. Rep. No. 491, 90th Cong., 1st Sess. 5 (1967).

[101] 16 U.S.C. § 1271 (1970).

pursuant to 16 U.S.C. § 1274, and not the date of study pursuant to 16 U.S.C. §§ 1275–1276, would be the priority date for reserved water rights, unless Congress provides otherwise.[102]

The argument that river designation entails the reservation of the entire flow of system component rivers in all cases is untenable in light of the Act's legislative history. The legislative history indicates that private parties likely could obtain consumptive water rights subsequent to river designation.

> It follows that all unappropriated and unreserved waters [following the reserved water right accompanying river designation] would be available for appropriation and use under state law for future development of the area.[103]

Therefore, it is clear that river designation does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right.

VIII. *NATIONAL WILDERNESS PRESERVATION SYSTEM*

Under the Wilderness Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (1970), Congress has designated wilderness areas on lands managed by interior agencies; *e.g.*, Bandelier Wilderness, Bandelier National Monument, New Mexico (designated Oct. 20, 1976); Black Canyon of the Gunnison Wilderness, Black Canyon of the Gunnison National Monument, Colorado (designated Oct. 20, 1976); Medicine Lake Wilderness, Medicine Lake National Wildlife Refuge, Montana (designated Oct. 19, 1976); Point Reyes Wilderness, Point Reyes National Seashore, California (designated Oct. 18, 20, 1976). Wilderness area designation is undertaken for the purpose of preserving and protecting wilderness in its natural condition without permanent improvements or human habitation, to fulfill public purposes of recreation, scenic, scientific, educational, conservation, and historic use.[104] I conclude that formally designated wilderness areas re-

[102] *See* 113 Cong. Rec. 2147–48 (Aug. 8, 1967).

[103] 114 Cong. Rec. 28313 (Nov. 26, 1968); *see also* 114 Cong. Rec. 26594 (Sept. 12, 1968).

[104] The Wilderness Act contains several congressional statements of purpose for the National Wilderness Preservation System. Under 16 U.S.C. § 1131(a) (1976), wilderness areas are designated for the purpose of "preservation and protection in their natural condition * * * to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." Wilderness is defined by 16 U.S.C. § 1131(c) to be "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain," and is further defined to include an area "retaining its primeval character and influence, without permanent improvements or human habitation * * * [which] has outstanding opportunities for solitude or a primitive and unconfined type of recreation * * * [and] may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." Finally, 16 U.S.C. § 1133(b) (1976) provides that "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."

ceive reserved water rights necessary to accomplish these purposes.

The uses which may be made of water reserved under the purposes stated in the Wilderness Act are restricted to the maintenance of minimum stream flows and lake levels (*e.g.*, for scenic appreciation and primitive water-borne recreation), and water required for ecological maintenance (*e.g.*, evapotranspiration for natural communities, wildlife watering, fire fighting). Reserved water rights may not be claimed for motor boating or other intensive commercial recreational development within wilderness areas, since such uses are not among the purposes of wilderness designation. *See* 16 U.S.C. §§ 1131(c), 1133(c) (1976). Thus, reserved water rights in wilderness areas will not have significant impact on present or future downstream appropriators.

Two additional provisions of the Wilderness Act deserve discussion because of their effect on the judicial rule of construction implying the reservation of water upon the creation of federal reservations. *See Cappaert* and *New Mexico*, *supra*. First, as far as NPS and FWS areas are concerned, it is clear that wilderness designations establish purposes for the creation of the reservations; *i.e.*, designation as wilderness does more than merely authorize secondary uses entailing no reserved water rights.[105] Second, similar to my conclusions concerning identical language in the Wild and Scenic Rivers Act and National Wildlife Refuge Administration Act, I do not view the provision of 16 U.S.C. § 1133(d)(7) (1976)[106] as undercutting the implied reserved water rights doctrine. Rather, the provision is intended to continue the application of then-existing principles of federal-state relations in water law, which includes the reserved water rights doctrine.

IX. *LANDS ADMINISTERED BY THE BUREAU OF RECLAMATION*

The Bureau of Reclamation administers large irrigation projects in the 17 Western States and the United States owns the lands upon which the dams, diversion works

[105] This reading of the Wilderness Act is confirmed by 16 U.S.C. § 1133(a) (1976), which provides that the: "purposes of this chapter are hereby declared to be *within* and supplemental to the purposes for which national forests and units of the national parks and national wildlife refuge systems are established * * *." (Italics added).

By stating that Wilderness Act purposes are "within" existing area purposes, this forecloses any argument that wilderness area designation is subsidiary to other management objectives. *Cf. United States v. New Mexico*, *supra*, 438 U.S. at 713–15.

[106] The provision provides: "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws."

This language cannot reasonably be construed to prevent reserved water rights from being created by wilderness area designation. The identical language was used four years later in the Wild and Scenic Rivers Act, where Congress went on to invoke the reserved water rights doctrine. *See* 16 U.S.C. § 1284(b) and (c) (1976). Rather, by not constituting either a new claim or a new denial or exemption from state water law, I am of the opinion that Congress intended to continue the *status quo* which allows for the creation and assertion of reserved water rights on lands withdrawn and reserved under the Wilderness Act. *See* discussion in fn. 99, *supra*.

and other supporting facilities are located. These projects have been constructed pursuant to the authority granted by Congress in the Reclamation Act of 1902,[107] and amendatory and supplementary reclamation laws.

Sec. 8 of the Reclamation Act of 1902,[108] provides that

> [N]othing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation * * * and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

This section has been interpreted by the courts as requiring the United States to apply, pursuant to state law, for water rights needed for any proposed Bureau of Reclamation project. In *California v. United States*, *supra*, 438 U.S. at 675, the Court held that

> Section 8 * * * requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water" * * * [and] the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.

The Court concluded by stating that "the Secretary should follow state law in all respects not directly inconsistent with these [congressional] directives." *Id.* at 678.

It is my opinion that sec. 8 of the 1902 Reclamation Act clearly prohibits the Bureau of Reclamation from claiming any reserved water rights for any reclamation project unless the terms of any project authorization subsequent to 1902 can fairly be read to provide for a reservation of water.[109] I know of none, but have not reviewed the multitude of post-1902 reclamation laws in sufficient detail to say with absolute confidence that none were intended.

X. *APPROPRIATION OF WATER RIGHTS BY THE UNITED STATES ON LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT, BUREAU OF RECLAMATION, NATIONAL PARK SERVICE AND FISH AND WILDLIFE SERVICE*

Having completed the review of the principal reserved water rights the agencies of this Department may claim, I now return to build on the discussion set forth in parts II and III B above, concerning the acquisition of non-reserved water rights by agencies of this Department.

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[107] 43 U.S.C. § 372 *et seq.* (1976).

[108] 43 U.S.C. § 383 (1976).

[109] *See also* 32 L.D. 254 (1903), holding that a proposed withdrawal of lands and waters in contemplation of a federal reclamation project would be ineffective to reserve waters because sec. 8 of the Reclamation Act generally requires reclamation project water rights to be obtained in accordance with state law. Broader statements in that opinion concerning the general authority of the United States to reserve waters to carry out purposes of federal reservations are plainly inconsistent with subsequent decisions of the Supreme Court, and are therefore overruled to the extent inconsistent with this opinion.

A. BLM *Non-Reserved Water Rights*

Throughout the history of this Nation, the public lands and the resources thereon have generally been administered for ultimate disposition as Congress has determined to be in the national interest. Congress has generally provided that the beneficiaries of the land grants—such as miners, homesteaders, railroads—would themselves acquire the water rights needed to develop the lands granted and the resources thereon pursuant to state law.[110] The United States has never claimed water rights for these ultimate beneficiaries of disposed public domain lands (except in the limited situations where Congress has specifically provided for the reservation of water such as in springs and water holes for use on adjoining tracts of public and private lands).

Congress has in other instances, however, provided that public domain lands will be retained by the United States and managed for the particular purposes. The Taylor Grazing Act, *supra*, and FLPMA, *supra*, are the major statutes providing for such retention of lands and providing for multiple-use, sustained yield management of the public domain. While, as I discussed earlier, these acts do not create reserved water rights in the United States, the management programs mandated in these acts require the appropriation of water by the United States in order to assure the success of the programs and carry out the objectives established by Congress.

My predecessors have held that the BLM has the right to make use of unappropriated water on the public domain to fulfill these management objectives without being limited by the substantive contours of appropriation as defined in the various state water laws. In a 1950 opinion,[111] Solicitor White found that this inherent power of the United States had been exercised under the Taylor Grazing Act.[112] He observed:

> As the owner of unappropriated nonnavigable water on the public domain, the United States may exercise all powers of ownership over such water. It may withdraw such water generally from private appropriation, as was done in the case of springs and water holes by the Executive order of April 17, 1926, or it may simply make the water in a particular case unavailable for private appropriation through taking it and using it. No specific form of reservation of water is required. Of course, before an officer of the United States can effectively act to exercise the ownership of the United States in unappropriated non-navigable water on public land, he must have the proper authority to do so. In section 2 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315a), the Secretary of the Interior has been directed to "make provision for the protection, administration, regulation, and improvement" of grazing districts, and to "do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the

[110] *See, e.g.*, Desert Land Act, supra, pp. 566–571 *U.S.* v. *New Mexico*, *supra*, at 702, fn. 5.

[111] *Solicitor's Opinion*, M–33969 (Nov. 7, 1950), "Compliance by the Department with State Laws Concerning Water Rights."

[112] 43 U.S.C. § 315a *et seq.* (1976).

land and its resources from destruction or unnecessary injury, to provide for the orderly use, *improvement*, and *development* of the range * * *" [italics added].

Section 10 of the act, as amended (43 U.S.C., 1946 ed., sec. 3151), provides that 25 percent of the money received under the act shall be available, when appropriated by Congress, for expenditure by the Secretary of the Interior "for the construction, purchase, or maintenance of range improvements." In addition, section 4 of the Taylor Grazing Act (43 U.S.C., 1946 ed., sec. 315c) specifically provides that reservoirs and other improvements necessary to the care and management of livestock for which grazing permits have been issued may be constructed on public lands within grazing districts under permits issued by the Secretary.

It is my opinion that these statutory provisions give the Secretary of the Interior broad authority to develop the unappropriated, non-navigable waters on the public domain within grazing districts and to make such waters available for use by the public for stock-watering purposes. In the exercise of this authority, it is not necessary that the Secretary make a formal reservation of the water; it is sufficient that he (or his authorized representative) exercise such domain and control over the water as to indicate that it is being reserved for public use and is being withdrawn from private appropriation.

I am of the opinion that Solicitor White's comments concerning "ownership" of the unappropriated water on the public domain are overly broad and irrelevant to the right of the United States to make use of such water, and I disavow them to the extent inconsistent with this opinion. As is the case of "ownership" of wild animals, concepts of "ownership" of unappropriated waters are not determinative in federal-state relations in nonreserved water rights. *See Hughes v. Oklahoma*, S. Ct. No. 77–1439 (Apr. 24, 1979).[113] What matters is that Congress, with few exceptions, has not authorized Interior agencies to transform any inchoate federal "ownership" of unappropriated waters into a federal water management system for private water rights competing with state systems, but rather has directed private parties to seek water under state law. *See* pp. 565–571, *supra*. However, I agree with and reaffirm Solicitor White's conclusion that by congressional directives to administer federal lands for particular management objectives, Interior agencies have the right to appropriate and make beneficial use of unappropriated water on the various federal lands for congressionally authorized management programs.

Solicitor White's further conclusion that mere exercise of "dominion and control over the water" on the public domain by the United States causes the water to be "reserved for public use," and "withdrawn from private appropriation," without further action, is in-

[113] That is, water rights in the arid West are generally considered "usufructuary;" *i.e.*, based on a right to *use* water rather than "ownership" of the corpus of the water. *See generally* R. E. Clark and C. O. Martz, "Classes of Water and Character of Water Rights and Uses," in R. E. Clark *I Waters and Water Rights*, ¶ 53.2 (1967).

consistent with my conclusion reached earlier concerning the need to comply with state law to the greatest practicable extent, and I thereby overrule it.[114]

In 1976, Congress passed the Federal Land Policy and Management Act[115] which reversed the historic policy of favoring general disposal of the public lands, and directed that, in general, they be retained in federal ownership and managed for the various resource uses and values they have. Sec. 102 of FLPMA, 43 U.S.C. § 1701 (1976), summarizes this management philosophy:

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

* * * * *

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

* * * * *

(11) regulations and plan for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which reflects the Nation's need for domestic sources of minerals, food, timber and fiber.

As part of the management of the public domain lands for multiple use, water is of necessity required to carry out the congressional mandate expressed in FLPMA and other laws. As I have noted, part of that mandate in FLPMA is a maintenance of the *status quo ante* in the relationship between the states and the Federal Government on water. Sec. 701(g), note to 43 U.S.C. § 1701. The *status quo* is a recognition of existing laws and practices, and thus allows for (a) the con-

[114] *See* part III B., *supra*. Two earlier Solicitor's Opinions also deserve mention. They were 55 I.D. 371; 55 I.D. 378 (1935), issued shortly after the Supreme Court's decision in *California Oregon Power Co., supra*, and ten years before the United States took the position before the Supreme Court in *Nebraska v. Wyoming, supra*, that the Federal Government retained title to all unappropriated nonnavigable water on the public domain. In the first, Solicitor Margold suggested that application might be made to the state for certain water rights in flowing streams subject to appropriation and diversion above or below a federal reservation, to afford "greater security" to the federal right, and to allow these rights to be incorporated into the state system. 55 I.D. at 375, 378. In the second opinion, the Solicitor held that the United States must apply to the state to obtain rights to use underground water made available by wells drilled on unreserved, public domain lands. Read together with Solicitor White's 1950 opinion, (which does not mention the earlier opinions), they illustrate the uncertainty that has abounded in this area of law. I overrule each of them insofar as they are inconsistent with the conclusions expressed in this opinion.

[115] 43 U.S.C. § 1701 *et seq.* (1976).

tinued appropriation of unappropriated nonnavigable waters on the public domain by private persons pursuant to state law, as authorized by the Desert Land Act, (b) the right of the United States to use unappropriated water for the congressionally recognized and mandated purposes set forth in legislation providing for the management of the public domain, and (c) application by the United States to secure water rights pursuant to state law for these purposes. Prior to FLPMA, these purposes, were as Solicitor White discussed, primarily those expressed in the Taylor Grazing Act and related laws. It is my opinion that in FLPMA, Congress authorized the United States to appropriate unappropriated water available on the public domain as of Oct. 21, 1976, to meet the new management objectives dictated in the Act. Two specific examples follow:

1. *Water for such consumptive uses as recreational campgrounds, timber production, and livestock grazing.*

Unappropriated water which is needed by the BLM to carry out Congress management directives in FLPMA, the Taylor Grazing Act, the O&C Act, and other statutes which I have determined in this opinion do not create reserved water rights may be appropriated by the BLM in accordance with this opinion. These purposes are diverse and found in several statutes, and need not be repeated here.

2. *Instream flows and other nonconsumptive uses.*

FLPMA requires BLM to manage the public domain lands for "multiple use" and dictates that the land-use plans to be developed for the public lands include provisions for the protection and enhancement of such things as fish and wildlife resources and scenic values.[116] If Congress management directives are to be effectively carried out, water is required for human and fish and wildlife consumption at such places as recreation areas, concession operations, wildlife watering and feeding areas, and for nonconsumptive uses to maintain such things as fish and wildlife habitats, scenic values, and areas of critical environmental concern.

B. *Bureau of Reclamation*

All water needed by the Bureau of Reclamation to operate and maintain its reclamation projects must, by express congressional enactment, be acquired pursuant to state law,

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[116] *See, e.g.*, sec. 102(a)(8) of FLPMA, which refers to management with consideration given to "fish and wildlife habitat," land in its "natural condition," and "outdoor recreation;" 43 U.S.C. § 1701(a)(8) (1976); sec. 103, which defines "areas of critical environmental concern," "multiple use" and "principal and major uses," with reference to, among other things, fish and wildlife, recreation and natural scenic and scientific values; 43 U.S.C. § 1702(a), (c), (*l*) (1976); and "rehabilitation, protection and improvements" including "water development and fish and wildlife enhancement;" 43 U.S.C. § 1751(b)(1) (1976).

unless Congress has provided otherwise. 43 U.S.C. § 383 (1976), *California v. United States*, 438 U.S. 645 (1978).

C. *Appropriation of Water on Lands Administered by the National Park Service*

The National Park Service may appropriate water to fulfill any congressionally authorized function for National Park System areas. These congressionally authorized uses include consumptive and nonconsumptive water uses actually used:

1. to conserve the scenery, natural and historic objects, and wildlife and to provide for public enjoyment of the same in National Park System areas, as authorized by 16 U.S.C. § 1 (1970) (*e.g.* uses outlined in Part V above);

2. in concession operations providing for public use and enjoyment of National Park System areas, as authorized by 16 U.S.C. §§ 3, 17(b), 20 (1970);

3. in the construction and maintenance of rights-of-ways in National Park System areas, as authorized by 16 U.S.C. § 5 (1970);

4. in construction and maintenance of airports in National Park System areas, as authorized by 16 U.S.C. § 7a (1970);

5. in the construction and maintenance of roads and trails in National Park System areas, as authorized by 16 U.S.C. § 8 (1970); and

6. in carrying out various miscellaneous authorities, *e.g.*, 16 U.S.C. §§ 1a–2, 16 and 17j–2 (1970), and the enabling legislation for individual areas of the National Park System.

D. *Appropriation of Water on Lands Administered by the Fish and Wildlife Service*

The Fish and Wildlife Service may appropriate water to fulfill any congressionally authorized use of National Wildlife Refuge System areas and other areas under FWS jurisdiction. The congressionally authorized uses include consumptive and non-consumptive uses actually used:

1. to conserve fish and wildlife and their habitat, as authorized by 16 U.S.C. § 668dd (1970) and individual statutes, executive orders, etc., establishing wildlife refuges, game ranges, bird preserves, etc. (*e.g.*, uses outlined in Part VI above);

2. to provide public acommodation and recreational use of the National Wildlife Refuge System, as authorized by 16 U.S.C. §§ 460k, 460k–1, 668dd(b)(1), 668dd(d)(1) (1970);[117]

3. in construction and maintenance of easements, as authorized by 16 U.S.C. § 668dd(d)(2) (1970);

4. in managing timber, range, agricultural crops, and animals, as authorized by 16 U.S.C. § 7151(b) (1970); and

[117] I do not believe that the provision of 16 U.S.C. § 668dd(1) (1970), "[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws," in any way prohibits the acquisition of appropriative water rights for NWRS areas. By not constituting a claim or denial to exemption from state water law, this Act preserves the *status quo*. *See* notes 99, 106, *supra*.

5. in carrying out National Wildlife Refuge System uses established in an individual System component's enabling legislation.

CONCLUSION

In this opinion, my staff and I have engaged in a review of the law relating to reserved and nonreserved water rights which may be claimed by the important land management agencies of this Department. The basic legal framework for the assertion of such rights is in some cases clearly established and in other cases not. When faced with the latter, we have been forced to reach conclusions which represent our best judgment about what Congress has intended in light of applicable judicial guidance, largely in *dicta*.

Having issued this opinion, the important remaining issues in this sensitive area will be in the application of individual laws, regulations, and other executive actions to specific factual circumstances. The principal problem facing agencies in this context is the task of proceeding as rapidly as funds will permit with an inventory of present water uses and needs. This information will enable this office (in consultation with the Justice Department as required where litigation has been filed) to determine what steps are required in each case to establish for the record our entitlement to a firm water supply for our identified uses and needs.

This Department's most extensive experience with the recordation and adjudication of its water rights has been in *Colorado Water Divisions 4, 5 and 6* (*see* footnote 19; footnote 33; footnote 60; footnote 88; pp. 600–601 *supra*). The result of these proceedings to date has been the granting of most (but not all) of interior agency claims; however, this has not resulted in displacement of private rights to any degree. In reviewing these cases, Dean Trelease has recently agreed that no state or private water user has shown that the United States has destroyed a private right by the assertion of a reserved water right and went so far as to suggest that the approved claims are minimal compared to the total flow of the five rivers.[118] While this result may not always obtain, we think it may be typical.

Once reserved rights are quantified, we fully expect that future water rights claims for agencies of this Department will be based largely on appropriation of unappropriated water to meet existing and future congressional directives regarding land management. Such appropriations do not threaten water rights previously established under state law. Thus if the Department's agencies can proceed promptly to quantify their reserved rights, there is ample room

[118] Trelease, "Federal Reserved Water Rights Since PLLRC," 54 Denver L. J. 473, 487–92 (1977); see also Corker, "A Real Live Problem or Two for the Waning Energies of Frank J. Trelease," 54 Denver L. J. 499, 504 (1977).

to foresee greater certainty and less antagonism between the states and the Federal Government over these issues.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor for Energy and Resources; Gary Fisher, Special Assistant to the Associate Solicitor for Energy and Resources; James D. Webb, Associate Solicitor for Conservation and Wildlife; Tom Lundquist, Sharon Allender, and William Garner, attorneys in the Division of Conservation and Wildlife; John Little, Jr., Regional Solicitor—Denver; Reid Neilson, Regional Solicitor—Salt Lake City; Charles Renda, Regional Solicitor — Sacramento; James Turner, Office of the Regional Solicitor—Sacramento; Jean Lowman, Regional Solicitor—Portland; William Swan, Office of the Field Solicitor—Phoenix; and Steve Weatherspoon, formerly with the Division of Energy and Resources, while he was in that Division.

LEO KRULITZ,
Solicitor.

APPEAL OF OUZINKIE NATIVE CORP.*

4 ANCAB 3

Decided *October 31, 1979*

Appeal from the Decision of the Bureau of Land Management AA-6688-A, 42 FR 62976 (Dec. 14, 1977).

* Not in chronological order.

Reversed in part, affirmed in part.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights

All lands leased prior to Dec. 18, 1971, pursuant to open-to-entry leases which are valid on their face must be excluded from conveyances to Native corporations.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Neither the Board nor the BLM is the appropriate forum in which to adjudicate the validity of third-party interests created by the State of Alaska.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Administrative Procedure: Decisions

The Board is bound by statements of Secretarial policy contained in Secretarial Orders published in the *Federal Register*.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights

The date upon which parties to an open-to-entry lease acknowledge their signing of the lease does not effect the facial validity of the lease instrument, even though the acknowledgment date is subsequent to the effective date of ANCSA.

APPEARANCES: David Wolf, Esq. and Robert H. Hume, Jr., Esq., Keane, Harper, Pearlman & Copeland, on behalf of Ouzinkie Native Corp.; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

The Bureau of Land Management (hereinafter BLM), on Dec. 9, 1977, issued the above-referenced decision to issue conveyance of lands to Ouzinkie Native Corp. (hereinafter Ouzinkie). The conveyance proposed in the decision included lands previously tentatively approved by the BLM for conveyance to the State of Alaska (hereinafter State). The proposed conveyance to Ouzinkie was specified subject to certain "third-party interests, if valid, created and identified by the State of Alaska." These interests included 11 open-to-entry leases, each approximately 5 acres in size. Appellant Ouzinkie Native Corp. appealed the validity of 7 of the 11 open-to-entry leases. Ouzinkie asked the Board to order the BLM to convey to Ouzinkie the lands covered by the seven disputed open-to-entry leases, and asked that the decision to issue conveyance (DIC) contain no reference to the seven leases.

The primary issue before the Board is whether the lands covered by any or all of the contested open-to-entry leases should be excluded from the conveyance or whether, as stated by the BLM, the conveyance to Ouzinkie shall include all such lands but be made "subject to" the leases, "if valid." A preliminary issue is whether and to what extent the Board or the BLM is to adjudicate the validity of the open-to-entry leases, and whether the leases, third-party interests created by the State, existed prior to Dec. 18, 1971.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (hereinafter ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

On Dec. 22, 1961, the State filed general purposes selection applications for lands near the Native Village of Ouzinkie. On Apr. 24, 1964, decisions to tentatively approve were issued for certain lands within T. 26 S., R. 20 W., Seward meridian, and in 1970 numerous open-to-entry leases for tracts within the subject lands were issued by the State. On Dec. 18, 1971, § 11 of ANCSA withdrew the lands surrounding the Village of Ouzinkie, including the lands in the preceeding State selections, for Native selection. On Sept. 24, 1974, Ouzinkie filed village selection application AA–6688–A for lands located near the village, including lands within the prior State selections.

On Dec. 13, 1977, the BLM issued the above-referenced decision to issue conveyance of lands to Ouzinkie. Certain specified lands, which had been State selected and tentatively approved in part, were found to have been properly selected under village selection application AA–6688–A. Accordingly, the tentative approvals previously given for conveyance of lands to the State were rescinded in part, and the underlying State selection applications accordingly rejected in part.

In its decision to issue conveyance, the BLM found that the subject lands

> Do not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the above-described lands * * * is considered proper for acquisition by Ouzinkie Native Corp. and is hereby approved for conveyance pursuant to section 14(a) of the Alaska Native Claims Settlement Act.

Continuing, the BLM provided:

> The grant of the above-described land shall be subject to:
>
> * * * * *
>
> 3. The following third-party interests, if valid, created and identified by the State of Alaska as provided by section 14(g) of the Alaska Native Claims Settlement Act * * *:
>
> (a) Open-to-entry leases, each approximately 5 acres in size, located in T. 26 S., R. 20 W., Seward Meridian:
>
> 1. ADL 52675 * * *.
> 2. ADL 52676 * * *.
> 3. ADL 52677 * * *.
> 4. ADL 52678 * * *.
> 5. ADL 52679 * * *.
> 6. ADL 52680 * * *.
> 7. ADL 52681 * * *.
> 8. ADL 52682 * * *.
> 9. ADL 52683 * * *.
> 10. ADL 52712 * * *.
> 11. ADL 52722 * * *.

On Jan. 11, 1978, Ouzinkie filed its Notice of Appeal from the above-referenced decision of the BLM. In its Statement of Reasons, Ouzinkie challenged the validity of 7 of the 11 open-to-entry leases listed by the BLM in the above-referenced DIC. One lease, ADL 52722, was allegedly terminated Nov. 16, 1972, for failure of the lessee to pay the annual lease payments for 1971 and 1972, but reinstated in 1973 upon payment of the past due payment. In support of said allegations, Ouzinkie submitted copies of 3 letters written by the State of Alaska to the lessee under ADL 52722. The 3 letters constituted, respectively, (1) a notice of default, (2) a notice that the lease had been terminated, and (3) an offer to reinstate the lease. Ouzinkie claims that the subsequent reinstatement was the unauthorized and unlawful creation of a new third-party interest by the State subsequent to Dec. 18, 1971, an act specifically forbidden by § 11(a) of ANCSA.

The 6 other leases contested by Ouzinkie are alleged not to have existed as of Dec. 18, 1971. Open-to-entry leases ADL 52675, ADL 52676, ADL 52680, and ADL 52681 were alleged to have been executed by the State after Dec. 18, 1971. Leases ADL 52678 and ADL 52679 were alleged to have been signed both by the State and by each of the respective lessees subsequent to Dec. 18, 1971. Ouzinkie claimed that the

execution of the leases by one or both parties after Dec. 18, 1971, constituted the unauthorized and unlawful creation of new third-party interests by the State subsequent to Dec. 18, 1971; acts specifically foreclosed by § 11(a) of ANCSA.

Prior to Ouzinkie's filing of its Notice of Appeal, the Secretary of the Interior issued Secretarial Order No. 3016, 85 I.D. 1 (1977), which declared that State of Alaska open-to-entry leases, including the lessee's statutory option to purchase the lands so leased, were valid existing rights protected pursuant to § 14(g) of ANCSA. The Secretary therein concluded that conveyances to Native corporations should be issued subject to such open-to-entry leases, and that the purchase option could subsequently be exercised. This Board was subsequently notified that the Secretary of the Interior had decided to reconsider Order No. 3016. Pending reconsideration, the Board suspended further action in this appeal.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (Nov. 27, 1978). Order No. 3029 (hereinafter Order) reaffirmed the Secretary's position in Order No. 3016 that rights created pursuant to the State of Alaska's open-to-entry lease program were valid existing rights within the meaning of ANCSA. Revising his earlier position that conveyances of land under ANCSA should be issued subject to previously issued open-to-entry leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations.

On Dec. 4, 1978, the Board terminated the suspension of action in this appeal and directed all parties to file, within thirty (30) days from receipt of its Order, any further briefing. Ouzinkie thereupon filed its Statement of Interest Affected and Statement of Reasons, to which BLM replied. Ouzinkie's Statement of Reasons was accompanied by the signature pages to the 6 leases alleged not to have been executed prior to Dec. 18, 1971, and by copies of the 3 letters of the State to the holder of the seventh contested lease regarding termination and reinstatement of his lease. Pursuant to a subsequent order of the Board, Ouzinkie filed complete copies of the 7 contested leases. On Aug. 6, 1979, the Board ordered further briefing. In response to said Order, briefs were filed by Ouzinkie, BLM, and the State.

DECISION

Ouzinkie has requested that the Board (1) adjudicate the contested open-to-entry leases, (2) find those leases invalid, and (3) include the land covered thereby within the lands to be conveyed to Ouzinkie.

[1, 2] Order No. 3029 mandated that lands tentatively approved for conveyance to the State of Alaska and leased by the State pursuant to its open-to-entry lease program

prior to Dec. 18, 1971, be excluded from conveyances to Native corporations. The Order also stated that the Department is not to adjudicate the validity of such leases:

> Neither the Department's regulations nor ANSCA require the Department to determine whether third party interests created by the State are valid under the applicable State law and regulations. The Department is not an appropriate forum to adjudicate these interests. If the State created interest is valid on its face it should be deemed valid for purposes of the conveyance document.

[3] The Board is bound by statements of Secretarial policy contained in Secretary's Orders published in the *Federal Register*. *Appeal of State of Alaska*, 3 ANCAB 129, 136, 86 I.D. 45, 49 (1979) [VLS 78–43]. Thus, where an open-to-entry lease was issued prior to Dec. 18, 1971, and is valid on its face, the land covered thereby is to be excluded from the lands conveyed to a Native corporation.

With regard to open-to-entry lease ADL 52722, there is nothing on the face of the lease instrument indicating that the lease was in fact terminated and then reinstated. The only evidence of such actions before the Board is in the form of copies of 3 letters, none of which constitute part of the lease instrument. Consequently, the Board may not consider the 3 letters in determining the validity of the lease. Examination of the lease instrument reveals nothing that would render the lease invalid. Thus, the lease is valid on its face and, in accordance with Order No. 3029, is deemed valid for purposes of the conveyance document.

With regard to the 6 other contested leases, Ouzinkie alleges that each of the lease instruments was signed by one or both of the parties after December 1971. The dates noted by Ouzinkie, however, do not purport to be the dates upon which the leases were signed. Rather, they are the dates upon which the parties acknowledged their prior signing of the leases.

The language of each lease indicates that it was executed on Sept. 28, 1970. Each of the 6 leases was by its terms "made and entered into this 28th day of September, 1970." Each lease provided that the lessor "does hereby let and demise to the Lessee, and the Lessee * * * does hereby take from the Lessor" the particular tract of land specified therein. The specified term of each lease was 5 years, running from Sept. 28, 1970, through Sept. 27, 1975, and each lease was renewable for an additional 5-year term.

There is nothing in any of the lease instruments specifying that it was signed by either or both parties after Dec. 18, 1971.

[4] Acknowledgment is not essential to the vailidity of a lease as between the parties. 1CJS Acknowledgments, § 64; *Smalley* v. *Juneau Clinic Building Corp.*, 493 P.2d 1296, 1301 (Alaska 1972). Without acknowledgment, a lease is complete, valid, and binding as between the parties. The Board concludes that the date upon which the parties to an open-to-entry lease acknowledge their signing of the lease instrument does not effect the facial validity of the lease, even though the ac-

knowledgment date is subsequent to Dec. 18, 1971.

Accordingly, the Board finds that the subject open-to-entry leases were valid on their face as between the parties as of Sept. 28, 1970, and in accordance with Order No. 3029, the lands covered by the leases are to be excluded from any conveyance to Ouzinkie.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection applications A–056426 and A–056427 is reversed insofar as the rejection applies to lands covered by the following open-to-entry leases issued by the State of Alaska:

ADL 52675
ADL 52676
ADL 52678
ADL 52679
ADL 52680
ADL 52681
ADL 52722

(b) Lands covered by the leases specified in (a) shall be excluded from those lands to be conveyed to Ouzinkie Native Corp.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

Open-to-entry leases ADL 52683 and ADL 52712 are not properly the subject of this appeal. Nonetheless, pursuant to Order No. 3029, if upon review by the BLM each of those two leases appears valid on its face, then it would be appropriate for the BLM to exclude the lands covered by the leases from the conveyance to Ouzinkie.

The holders of the two remaining open-to-entry leases specified by the BLM in the subject decision, ADL 52677 and ADL 52682, have also appealed to this Board. (*Appeal of Schwaab*, ANCAB VLS 78–19). The Board has examined the instruments embodying those two leases and is rendering a separate decisions as to whether the lands covered thereby should be excluded from the conveyance to Ouzinkie.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

ISLAND CREEK COAL CO.

1 IBSMA 285

Decided *November 9, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement from that portion of Administrative Law Judge Tom M. Allen's decision in Docket No. CH9–81–R, issued July 12, 1979, which vacated Violation No. 2 of Notice of Violation No. 79–I–47–10, issued to Island Creek Coal Co. for its purported failure to maintain the coal haul road at the Guyan No. 1–C underground mine (Logan County, West Virginia) in accordance with the requirements of 30 CFR 717.17(j)(3)(i).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

Haul roads shall be maintained, in accordance with 30 CFR 717.17(j), by means that will prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area, to the extent possible using the best technology currently available.

2. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

In determining whether there is a violation of the haul road maintenance requirements of 30 CFR 717.17(j)(3)(i), the relevant inquiry is not whether the the road's condition constituted failure to maintain it in view of its use, but whether its condition demonstrated a failure to maintain it in a manner that would prevent adverse impacts on the hydrologic balance in general and additional contributions of suspended solids to streamflow or to runoff outside the permit area in particular.

APPEARANCES: Billy Jack Gregg, Esq,. Office of the Field Solicitor, Charleston, West Virginia, Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by the Office of Surface Mining Reclamation and Enforcement (OSM) from that portion of the Administrative Law Judge's (ALJ's) decision in Docket No. CH9–81–R which vacated Violation No. 2 of Notice of Violation No. 79–I–47–10, issued to Island Creek Coal Co. (Island Creek) for an alleged failure to maintain a coal haul road in accordance with 30 CFR 717.17(j)(3)(i). The ALJ held that Island Creek's testimony was sufficient to overcome OSM's evidence of Island Creek's noncompliance with the Department's regulations. We disagree with this conclusion and, therefore, reverse.

Factual and Procedural Background

On Apr. 3, 1979, OSM Inspectors David Beam, Charles Crumrine, and Dan Pollock inspected Island Creek's Guyan No. 1–C underground coal mining operation in Logan County, West Virginia,[1] and issued Notice of Violation No. 79–I–47–10 to the company on Apr. 4, 1979.[2] Four violations of the Department's interim regulations were specified: (1) failure to pass all surface drainage through a sedimentation pond or series of sedimentation ponds in violation of 30 CFR 717.17(a); (2) failure to perform maintenance on the coal haul road by surfacing with a durable, non-toxic,

[1] This inspection was conducted pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (Supp. I 1977), and 30 CFR Part 721 of the Department's interim regulations.

[2] Notice of Violation No. 79–I–47–10 was issued pursuant to 30 U.S.C. § 1271(a)(3) (Supp. I 1977) and 30 CFR 722.12.

non-acid producing material in violation of 30 CFR 717.17(j)(3)(i); (3) placement of material on the downslope side of a road cut in violation of 30 CFR 717.14(c); and (4) failure to provide adequate information on the mine identification sign in violation of 30 CFR 717.12(b).

Island Creek applied for review of this notice on May 4, 1979; a hearing was held before an ALJ on June 6, 1979. Prior to his taking evidence on the circumstances underlying the issuance of the notice, the ALJ granted Island Creek's motion to withdraw from the scope of the review proceeding the violations of 30 CFR 717.17(a) and 30 CFR 717.12(b) indicated in the notice. Thereafter, testimony was received from David E. Beam (Reclamation Inspection Specialist, OSM) and Larry Derenge (District Manager, Island Creek). Additionally, OSM introduced three exhibits relevant to this appeal: (1) a copy of Notice of Violation No. 79-I-47-10; (2) a copy of a document indicating that this notice was terminated by OSM on May 8, 1979, as the result of Island Creek's having abated the conditions giving rise to the specified violation; and (3) a photograph of the coal haul road that is the subject of the violation of 30 CFR 717.17(j)(3)(i) specified in the notice.

On July 12, 1979, the ALJ issued a written decision upholding Violation No. 3 (concerning 30 CFR 717.14(c)) and vacating Violation No. 2 (concerning 30 CFR 717.17(j)(3)(i)). OSM filed its appeal to the Board from this decision on Aug. 13, 1979, and its brief in support of the appeal on Sept. 14, 1979. Island Creek did not file a brief or otherwise participate in the appeal.

Discussion and Conclusion

30 CFR 717.17, like the analogous regulation applicable to surface mines, sec. 715.17, has as its purpose the prevention of "long-term adverse changes in the hydrologic balance that could result from * * * coal mining operations."[3] Changes in water quality are to be minimized, and preventive measures are preferred over treatment methods in achieving this objective.[4] For this reason 30 CFR 717.17(j), the specific subsection involved in this case, provides that "haul roads * * * shall be * * * maintained * * * so as to * * * prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available."[5] Wetting, scraping, or surfacing are road maintenance practices that may, depending on the

[3] 30 CFR 717.17; *see also* 30 CFR 715.17.

[4] "Changes in water quality and quantity, in the depth to ground water, and in the location of surface water drainage channels shall be minimized * * *. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize underground coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities * * *." *Id.*

[5] 30 CFR 717.17(j)(1).

circumstances, meet the requirements of 30 CFR 717.17(j).[6]

[1, 2] The ALJ's decision below concludes its discussion of this violation as follows:

> **I find that the existence of mud, coal dust, and some ruts on roads over which 100 trips per day are made with vehicles weighing in excess of 100,000 pounds does not constitute the failure to maintain a haul road and that the evidence of the applicant was sufficient to carry the burden of persuasion resulting in the preponderance of evidence in their favor, and violation No. 2 therefore is without merit and should not have been issued.[7]**

This finding concerning the condition of the road, however, is not consonant with the purpose of the maintenance requirements. We conclude that the issue is not whether the road's condition "constitute[d] failure to maintain" in view of its use, but whether its condition demonstrated Island Creek's failure to maintain it in a manner that would prevent adverse impacts on the hydrologic balance in general and additional contributions of suspended solids in particular.

OSM's evidence in this case, *e.g.*, photographic Exhibit No. 3 and the inspector's testimony that there were ruts approximately 6 inches deep [8] and that the road was "covered by mud and coal dust" [9] and not surfaced with durable material,[10] indicated conditions inconsistent with those preventive purposes. Island Creek's testimony, rather than carrying the burden of persuasion in its favor, corroborated OSM's evidence in that it merely explained the maintenance practices that gave rise to the condition of the haul road observed by OSM's inspector. The district manager stated that the company's normal maintenance practice was to regrade the road and "whenever the running got bad on it, we would resurface it." [11] Although Island Creek did not keep maintenance records,[12] the last time the road had been resurfaced with rock was during the winter * * * because we had some problems with it."[13]

It is true, as the ALJ observed, that OSM offered "no testimony or evidence that any of the mud or coal dust on the road contributed to any suspended solids in any stream * * *." [14] However, the photograph of the haul road and the testimony describing its appearance, coupled with the unchallenged opinion testimony of the inspector that "the road was not properly surfaced in the manner which would prevent the addition of additional suspended solids to the

[6] 30 CFR 717.17(j)(3)(i).
[7] ALJ's Decision at 3.
[8] Tr. 26.
[9] Tr. 10.
[10] Tr. 14, 23. The ALJ's opinion questions why OSM did not cite Island Creek for a violation of 30 CFR 717.17(j)(2)(iv). This subsection pertains to standards for the construction of roads and includes a requirement that they be surfaced with "durable material." In contrast, 30 CFR 717.17(j)(3)(i), which requires the routine maintenance of roads by means including surfacing, does not specify that durable material must be employed in such maintenance. The resurfacing of a road with a durable material may, however, be necessary under some circumstances to maintain a durable material may,, however, be 30 CFR 717.17(j). Regardless, however, of the cause of the deficiency, it is the fact of the inadequacy of the roadway conditions and not that cause which is at issue here.
[11] Tr. 34.
[12] Tr. 44.
[13] Tr. 34.
[14] ALJ's Decision at 2.

waterflow, due to the fact that the road was covered with mud and coal fines," [15] was sufficient in this particular proceeding to establish a prima facie case which, as we have said, was not contradicted by Island Creek. Thus, the record that is before us establishes that Island Creek's maintenance practices were insufficient to meet the requirements of 30 CFR 717.17(j). The decision below vacating Violation No. 2 of Notice of Violation 79–I–47–10 is therefore reversed.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

EFFECT AND IMPLEMENTATION OF SOLICITOR'S OPINION M–36893 ON "UNCLAIMED, UNDEVELOPED."

M–36893 (Supp.)

Decided *November 19, 1979*

Coal Leases and Permits: Permits: Generally—Mineral Leasing Act: Lands Subject to—Multiple Mineral Development Act: Generally—Phosphate Leases and Permits: Permits

A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land. Land in a mining claim remains "unclaimed" land for the purposes of M–36893 so long as the claim is not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance. Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal potential constitute development. The bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.

Coal Leases and Permits: Applications—Mining Claims: Contests—Phosphate Leases and Permits: Permits

The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.

OPINION BY OFFICE OF THE SOLICITOR

TO: SECRETARY
FROM: SOLICITOR
SUBJECT: EFFECT AND IMPLEMENTATION OF SOLICITOR'S OPINION M–36893 ON "UNCLAIMED, UNDEVELOPED."

On Aug. 2, 1977, this office explained the meaning of the identical statutory language in secs. 2(b) and 9(b) of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 201(b)

[15] Tr. 14.

(1970)[1] and 211(b) (1976), respectively, which limits the issuance of coal and phosphate prospecting permits to "unclaimed, undeveloped" lands. *Solicitor's Opinion* M-36893, 84 I.D. 443 (1977). The 1977 Opinion defined "unclaimed" as "that land which is not subject to a valid mining claim, coal land claim, or any other claim which could ripen into full ownership of the land," 84 I.D. at 446, and stated that a "prospecting permit which includes land embraced in a mining claim is * * * a nullity with respect to that land." 84 I.D. at 454.

I have been asked several questions about the consequences of the 1977 Opinion and about aspects of the statutory language that have not been previously addressed. This Opinion considers the following additional matters:

(1) Are prospecting permits previously issued in "developed" or "claimed" areas void or voidable?

(2) Does the term "unclaimed" refer to the absence of mining claims of any status or only those shown to be valid?

(3) What is meant by the term "undeveloped"?

(4) What procedures should be adopted to ascertain the present status of a prospecting permit? For example, does the holder of a noncompetitive (preference right) lease application have any opportunity to contest a mining claim or rebut evidence of development and, if successful, eliminate any effect the mining claim or alleged development may have on its permit rights?

(5) Are there any exemptions from the statutory provision as construed in the Opinion? For example, does a noncompetitive (preference right) lease applicant who is a "bona fide purchaser" of the original prospecting permit, or who has made substantial expenditures related to the area covered by the application, have any right to be exempted from the scope of the 1977 Opinion?

For the reasons stated in this Opinion, I conclude that: (1) Prospecting permits previously issued in "developed" or "claimed" areas are void. (2) The term "unclaimed" refers to the absence of mining claims shown to be valid. (3) The term "undeveloped" means the lack of surface mineral activities, associated with the delineation of an ore body or mineral resource, which could reasonably be expected to disclose knowledge of an area's coal or phosphate potential. (4) Holders of noncompetitive (preference right) lease applications have an opportunity, through private contests, submission of evidence of an area's status or by rebutting a show cause order, to show that lands under application were "unclaimed, undeveloped" at the time of prospecting permit issuance. (5) Neither the bona fide purchaser provisions of sec. 27(h)(2) of the Mineral Leasing Act nor the substantial expenditure of monies related to the area covered by an application

[1] Repealed by sec. 4 of the Federal Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 30 U.S.C. § 201(b) (1976).

exempt prospecting permits which embrace lands that are "claimed" or "developed" from the statutory prohibition.

1. *Are Prospecting Permits Issued in "Claimed" or "Developed" Areas Void or Voidable?*

The first question to be addressed is whether a prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is void or voidable. Any attempt to appropriate, by locating a mining claim, land which is not open to appropriation because it is withdrawn or unavailable for some other reason is a nullity and the claim is void ab initio. See *El Paso Brick Co., v. McKnight*, 233 U.S. 250 (1914); *Brown v. Gurney*, 201 U.S. 184 (1906); *W. A. Todd*, 28 IBLA 180 (1976). For example, mining claims located prior to Aug. 11, 1955, on lands withdrawn for powersites are void ab initio. *Earl D. Roberts*, 28 IBLA 286 (1976); *Armin Speckert*, A-30854 (Jan. 10, 1968). Mining claims located on lands classified for disposition under the Recreation and Public Purposes Act, 43 U.S.C. § 869 to 869-4 (1976), are also void ab initio. *Raymond P. Heon*, 76 I.D. 290 (1969); *C. V. Armstrong*, A-30889 (Feb. 28, 1968).

Even if the Department subsequently restores previously withdrawn lands to entry and location under the mining laws, this does not revive previously attempted mining locations. *Dorothy L. Benton*, A-30729 (May 31, 1967); *J. P. Hinds*, 25 IBLA 67, 83 I.D. 275 (1976); *Beverly Trull*, 25 IBLA 157 (1976) (Mining Claim Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1976), did not resuscitate claims located prior to date of Act). *See also*, *Roy R. Cummins*, 26 IBLA 223 (1976); *Earl D. Roberts*, *supra*.

Similarly, leases issued by the Department that erroneously include land not subject to the Mineral Leasing Act are void and must be cancelled. *Oil Resources, Inc.*, 14 IBLA 333 (1974) (noncompetitive oil and gas lease in a wildlife refuge is a nullity); *O. D. Presley*, 21 IBLA 190 (1975) (cancellation of oil and gas lease covering land previously patented with no mineral reservation); *Amerada Hess Corp.*, 24 IBLA 360, 83 I.D. 194 (1976) (cancellation of attempted lease of lands underlying railroad right-of-way which did not reserve mineral estate in United States); *Harold H. Sternberg*, A-30700 (May 25, 1967) (cancellation of lease containing land already included in outstanding lease); *David A. Provinse*, 27 IBLA 376 (1976) (cancellation of a noncompetitive oil and gas lease which included land within a previously known geological structure); *see Solicitor's Opinion*, 74 I.D. 295 (1976); *see also Boesche v. Udall*, 373 U.S. 472 (1963).

Both these lines of cases reach the same result: an attempted appropriation of land which is not available for mining or subject to leasing is void. The mining cases also hold

that the subsequent availability of such land to entry and location will not operate to reinstate or validate previously attempted claims. While there are no cases deciding this point with respect to leasing act activities, the analogous result is logical.[2]

The foregoing reinforces the conclusion of Opinion M-36893 that a prospecting permit which embraces land included in a valid mining claim is a nullity with respect to that land.

2. *Does the Term "Unclaimed" Refer to the Absence of Mining Claims of Any Status or Only Those Shown to be Valid?*

The discovery of a valuable mineral deposit is the *sine qua non* for a valid mining claim. *Cole v. Ralph*, 252 U.S. 286 (1920); *Lawson v. United States Mining Co.*, 207 U.S. 1 (1907); *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964); *United States v. Bechthold*, 25 IBLA 77 (1976). This is merely an expression of the requirement of the mining law itself. *See* R.S. § 2319, 30 U.S.C. § 22 (1976). To be valid the discovery of a valuable mineral deposit must be within the limits of the claim. *United States v. Zweifel*, 508 F.2d 1150 (10th Cir. 1975), *cert. denied*, 423 U.S. 829 (1976); *United States v. Vaux*, 24 IBLA 289 (1976). For a discovery in the case of lode claims there must be "tangible proof of the existence of the vein * * * bearing sufficient mineralization" to meet the prudent man test.[3] *Henault Mining Co. v. Tysk*, 419 F.2d 766 (9th Cir. 1969), *cert. denied*, 398 U.S. 950 (1970); *United States v. Vaux*, *supra* at 298.

The recordation of a certificate or notice of location, while it casts a cloud upon the title of the United States to lands covered by location, is not sufficient to establish a claim's validity absent discovery. *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964); *cf. Cameron v. United States*, 252 U.S. 450 (1920).

Thus, where there has been a location, but no discovery, a claimant has not established a valid mining claim.

A mining location by itself gives the locator the exclusive right to prospect, during his actual occupation of the land, against subsequent locators. *See* 30 U.S.C. § 26 (1976). A location by itself, however, does not constitute a claim to title (a claim having earned the right to apply for patent) since discovery is the *sine qua non* of such claim to title, *cf. Cole v. Ralph*, *supra*; *Lawson v. United States Mining Co.*, *supra*; *Davis v. Nelson*, *supra*, and

[2] While there appear to be no cases addressing this point, *i.e.*, whether leases of public domain lands not open to appropriation become effective without further action when those lands subsequently become open, there are cases holding that lease application filed for lands before those lands are open to leasing must be rejected and cannot be held pending future availability of the land. *See, Curtis E. Thompson*, 74 I.D. 168 (1967); *Ethel C. Radzewicz*, A-30866 (Jan. 29, 1968). *See* 43 CFR 2091.1(e).

[3] The prudent man test requires a showing of mineralization, both in quality and quantity, which would warrant the further expenditure of money and effort by an individual of ordinary prudence in a reasonable expectation of developing a valuable mine. *United States* v. *Coleman*, 390 U.S. 599 (1968); *Chrisman* v. *Miller*, 197 U.S. 313 (1905), approving *Castle* v. *Womble*, 19 L.D. 455 (1894).

thus has no segregative effect against subsequent applicants for the land for the purpose of the "unclaimed" language. *Cf.* 84 I.D. at 446. Such a conclusion is harmonious with the underlying rationale of my earlier Opinion. That rationale is that knowledge gained from a mining claim should not be used to gain unfair advantage in the issuance of a prospecting permit. In those instances where the mining claim is not valid, but merely a cloud on the United States' title, *i.e.*, where there has been no discovery of a mineral locatable under the mining laws, the claimant most likely has not gained sufficient knowledge of the land's potential for coal or phosphate to be advantaged.[4]

I also hold that the validity of the mining claim is to be tested as of the date the prospecting permit issued. *Cf. United States v. Vaux*, *supra* at 292 (1976); *United States v. Fleming*, 20 IBLA 83, 99 (1975). Thus subsequent discovery on a previously located mining claim would not operate to invalidate a regularly issued existing prospecting permit covering such located land, assuming the land was "undeveloped" at the time the permit was issued.

3. *What Is Meant by the Term "Undeveloped"?*

There are two questions which need to be answered in defining "undeveloped." First, what types of development are contemplated—agricultural, residential, mineral, or other? Second, what quantum of development is contemplated? The first is a problem of a kind, while the second is one of degree.

The meaning of this term was not explained in the legislative history of the Mineral Leasing Act, including the 1960 amendments, and it has not been precisely defined in any administrative or judicial decision since then. Its meaning is nonetheless reasonably clear.

Before Congress enacted the Mineral Leasing Act of 1920, the public lands were free and open to mineral exploration, both under the Mining Law of 1872 and under such laws as the Stone Act, 30 U.S.C. § 161 (1976), the Placer Petroleum Act, Act of Feb. 11, 1897, 29 Stat. 526, and the coal land laws. Under the coal land laws system, for example, if a person opened and improved a coal mine, he could obtain the right to purchase those coal lands. R.S. 2348, 30 U.S.C. § 72 (1976). Under each of these laws, individuals and companies conducted considerable exploration and development operations. While most operations were not of the vast scale possible with today's mechanization, many mines were opened with varying degrees of production. There are two situations where mineral activity could show the existence of mineable deposits of coal. The first arises from the nature of some coal deposits in the Western public land states. Coal

[4] One can recognize the logic of this when it is considered that a large number of locations not validated by discovery are so-called "paper claims," filed without any on-the-ground activity.

in these states often has surface outcrops that can be exploited through a shaft or drift mine. Second, hard-rock mines traditionally used drifts of several hundred feet in hopes of encountering hidden lodes or veins of valuable mineral bearing ore. These kinds of activities could be sufficient in some cases to show the presence of mineable coal or phosphate deposits.

Portions of the legislative history of the Mineral Leasing Act show that some members of Congress felt that no prospecting system was needed for coal because its location was so well known. *See e.g.*, 51 Cong. Rec. at 15182 (1914). In my previous opinion I observed that, precisely because so many coal lands were known, Congress deemed it undesirable to issue coal prospecting permits on lands that had been explored for any mineral, including exploration for locatable minerals pursuant to mining claims:

> Congress probably determined, in other words, that it is not in the public interest for persons to obtain prospecting permits, and eventually noncompetitive leases, for coal in areas where, under mining claims or through other mineral development, knowledge has already been obtained about the land's potential value for coal. [Footnote omitted.]

84 I.D. at 445.

The Department did consider the meaning of "undeveloped" in *Emil Usibelli*, 60 I.D. 515 (1951). Usibelli protested the issuance of a preference-right coal lease to another on the ground that the prospecting permit was illegaly issued because the lands subject to the permit were "developed." The permit and lease were issued under the Act of Oct. 20, 1914, *as amended* by the Act of Mar. 4, 1921, 41 Stat. 1363 (extending the prospecting permit system to Alaska),[5] which used the same language as sec. 2 of the Mineral Leasing Act, 38 Stat. 741, *as amended*. These lands were in the Nenana coal field in Alaska. Sec. 1 of the Act of Oct. 20, 1914, 38 Stat. 741, authorized the Secretary to:

> [S]urvey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields * * *.

Usibelli alleged that since Congress said that the Nenana coal field was known to be valuable for coal, it was not an undeveloped area. He did not, however, state whether any of the land applied for had been explored by surface-disturbing activity or whether any shafts had been opened or mines improved before the Department issued the prospecting permit. The decision concluded that, despite the language in section 1 of the Act of Oct. 20, 1914, a prospecting permit could be granted for land in the Nenana coal field. The knowledge

[5] 48 U.S.C. §§ 431–445 (1952). The legislative history of the Act of Mar. 4, 1921, is silent with respect to a definition of "unclaimed, undeveloped." *See* S. Rep. No. 735, 66th Cong., 3d Sess. (1921). The Alaskan coal land laws were repealed by sec. 20 of the Act of July 7, 1958, 72 Stat. 351 and the Act of Sept. 9, 1959, 73 Stat. 490. The 1959 Act wholly incorporated federal coal in Alaska into the Mineral Leasing Act.

that the lands were in a known coal field, without more, did not remove the area from the category of "undeveloped." 60 I.D. at 519. Although *Emil Usibelli* does not specifically define "undeveloped," it is consistent with the conclusion that the term refers to activities undertaken for the purpose of exploring, defining, opening, or extracting a mineral deposit. *See Sinclair Mines, Inc.*, A-27160 (Aug. 18, 1955) (the Department cannot grant a prospecting permit for lands on which abandoned mines are present). Clearly the term "developed" includes mineral development activities.

Turning to the second aspect, that of degree, a spectrum of activities ranging from prospecting without surface disturbance (by geophysical, geochemical, or other methods) through exploration to actual production could constitute "development." According to the dictionary, "develop" means "to bring out the capabilities or possibilities of" or "to be disclosed; become evident or manifest." *Random House College Dictionary* 363 (L. Urdang ed. 1973). Using this definition, anything tending to show the existence of coal or phosphate would constitute development.

The use of the word "develop" in a mineral context, however, envisages a greater amount of activity. About the time the Mineral Leasing Act was adopted, a publication of the Department, Bureau of Mines Bulletin 95, *A Glossary of the Mining and Mineral Industry* (1920) says that "development" means "work done in a mine to open up ore bodies, such as sinking shafts, and driving levels, etc." *Id.* at 95.

The *Dictionary of Mining, Mineral, and Related Terms* (P. Thrush ed. 1968), the Bureau of Mines publication which revises Bulletin 95, defines "develop" as "[t]o open a mine and ore; * * * To open up ore bodies by shaft sinking, tunneling, or drifting." *Id.* at 317. Related terms are "development drilling" which is defined as "[d]elineation of the size, mineral content, and disposition of an ore body by drilling boreholes," *id.* at 318, and "development" which is defined as the "[w]ork of driving openings to and in a proved ore body to prepare it for mining and transporting the ore." *Id.* at 318.

The question reduces itself to what definition of development is most consistent with the objective Congress sought to achieve in limiting the issuance of prospecting permits to "unclaimed, undeveloped" areas. That objective was, of course, to prevent individuals who possessed knowledge about an area's coal and phosphate resources from profiting thereby by obtaining the opportunity to lease coal or phosphate without competition. Although any activity which might lead to knowledge of an area's coal or phosphate resources—including geochemical or geophysical activity which can occur without disturbing the surface—could reasonably be termed

development for this purpose, the better definition is the one normally used and understood by the mining industry when the law was drafted. I therefore hold that development, in the context of the Act means exploration or development activity associated with the delineation of a mineral body which could reasonably be expected to disclose knowledge concerning an area's coal or phosphate potential. Thus, a single discovery shaft of ten feet on a mining claim to satisfy state law would not ordinarily constitute development, while drilling several holes on a pattern to determine the grade, volume, and three dimensional outline of an ore body would constitute the type of development that would lead to knowledge of an area's coal or phosphate potential. Likewise, the log of a bore hole from a single wildcat oil and gas well may not be the type of development which provides advantageous knowledge to an applicant for, or holder of, a prospecting permit, but an oil and gas lease on which several wells (either producing or not) had been drilled would provide geologic information in the form of well logs which would usually indicate occurences of coal or phosphate. What is required is a case-by-case review, to determine whether mineral development activity which occurred prior to issuance of a prospecting permit could reasonably have provided knowledge about coal or phosphate potential.

Adopting a narrower definition; *i.e.*, limiting "development" to those activities conducted after discovery, leading to production of the mineral discovered, would make the word "undeveloped" superfluous. No production can logically occur until a claim is validated by discovery. At that point the location becomes a valid claim, and prospecting permits cannot be issued in such areas consistent with the "unclaimed" limitation. In order to give meaning to both "unclaimed" and "undeveloped," the latter must include activities which can take place before a valid claim being established; *i.e.*, prior to discovery.

I am similarly convinced that nonmineral activities are excluded from the ambit of "undeveloped." The most likely type of nonmineral development is agricultural development under the Homestead Laws. The Department's earliest interpretation of "undeveloped" did not consider agricultural development as barring prospecting permits. The original regulations implementing the Mineral Leasing Act expressly limit the issuance of prospecting permits to unclaimed, undeveloped lands, but go on to say:

> Where lands included in a permit have been or may be disposed of with reservation of the coal deposits, a permittee must make full compliance with the law under which such reservation was made * * *.

Circ. No. 679, 47 L.D. 489, 500 (1920), implementing sec. 34 of the Mineral Leasing Act of 1920, 30 U.S.C. § 182 (1976).

The law under which a reservation of leasable minerals could be made is any one of several agricultural disposal laws. Thus the regu-

lations appear to contemplate the issuance of permits on land already under agricultural development. This contemporaneous construction supports the conclusion, and I so hold, that "undeveloped" in the Mineral Leasing Act refers to mineral development, not agricultural or other nonmineral development.

In enforcing this requirement for pending lease applications, the Bureau should, as part of the adjudication process, examine its kinds of records to determine what kinds of activities took place prior to the issuance of the prospecting permit. If no development activity is discovered in Departmental records, the permit issuance can be considered in compliance with the "undeveloped" limitation; on the other hand, if development activity was evident, the affected portions of the permit should be identified by smallest legal subdivision [6] and any pending preference right lease application should be rejected to that extent subject to the applicant's right to an opportunity for a hearing.

4. *What Procedures Should be Adopted to Ascertain the Present Status of a Prospecting Permit Which May be in a "Claimed" or "Developed" Area?*

As I pointed out in my earlier Opinion, prior to the Multiple Mineral Development Act, 30 U.S.C. §§ 521–531 (1976), the Department consistently interpreted the Mineral Leasing Act to prohibit the issuance of permits and leases for all leasable minerals on lands subject to valid mining claims. *Ohio Oil Co. v. Kissinger*, 58 I.D. 753 (1944). This was merely a variation on the rule that inconsistent claims of right for the same tract must not exist at the same time. *Roos v. Altman*, 54 I.D. 47 (1932). Another, broader statement of this rule is that an allowed entry on public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed. *Bunker Hill & Sullivan Mining and Concentrating Co. v. United States*, 226 U.S. 548 (1913); *Hiram M. Hamilton*, 38 L.D. 597 (1910).[7]

This rule is easily followed in the case of activities which require Departmental review of any attempted appropriation. In the case of mining claims, however, prior to the passage of the Federal Land Policy and Management Act of 1976, there was no requirement that a claimant

[6] By excluding the smallest legal subdivision from a prospecting permit or lease application, the permittee or lease applicant is in exactly the same position he would have been in had the "undeveloped" criteria been applied at the time of permit application. *See* e.g. 43 CFR 3501.1–3 (1975).

[7] Shortly after the passage of the 1920 Act, this rule was held to apply to applications filed under the Mineral Leasing Act. *Sullivan v. Tendolle*, 48 L.D. 337 (1921). While applications, permits, or leases do not constitute a technical "segregation" or "entry" of the lands, this same rule was applied to them as a principle of the general administrative rule. *Martin Judge*, 49 L.D. 171 (1922); *Lula T. Pressey*, 60 I.D. 101, 102 (1947), and cases cited therein.

under the Mining Law of 1872 record his claim with the Department.[8] Until a claimant sought a patent to his claim, he had no responsibility either to notify the Department's Land Office of the existence or location of his claim, or to demonstrate the validity of the claim in the absence of a contest.

This produced the situation where an applicant or entryman for a particular tract would not normally be aware of the existence of mining claims by reference to the Land office records alone. The burdens of proof and presumptions adopted by the Department in response to this situation are explained in *Roos v. Altman, supra*, concerning a protest and contest between a stock-raising homestead entryman and a mineral claimant who had applied for patent. In *Roos v. Altman, supra* at 54, Assistant Secretary Edwards stated:

> In the event that an applicant under other laws seeks to enter or select the land, it is manifestly necessary that the evidence of its condition as to prior occupation and appropriation should be furnished by him. *Kern Oil Co. et al. v. Clarke* (30 L.D. 550, 566).
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> * * * * *
>
> An affidavit in conformity with Circular No. 738, *prima facie* establishes that the land applied for is not occupied or appropriated under the mining laws, and if the entry is *regularly* allowed, the burden will be upon the mineral claimant to show the contrary, and this showing is not deemed to be made unless the mineral claimant established a prior existing location perfected by discovery, or a mining location in the actual possession of the claimant, who is diligently engaged in the search for mineral at the date of the inception of the stock-raising entry. [9] *Ainsworth Copper Co.* v. *Bew* (53 I.D. 382); *United States v. Hurliman* (51 L.D. 258). [Italics in original.]

If this procedural and evidentiary rule were applied to the situation involving coal or phosphate preference right lease applicants, it would mean that their prospecting permits would be considered regular and unaffected by the existence of mining locations claims on the

[8] With the requirement of sec. 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (1976), that mining claims be recorded with the BLM, after October 1979 it will be possible for the Department to determine if there is a pre-existing claim for land which is sought to be appropriated for another use; *e.g.*, prospecting for phosphate, the remaining mineral to which the "unclaimed, undeveloped" language limits the Secretary's permitting authority.

[9] *Roos v. Altman, supra*, raises the question whether mining locations which are in the actual possession of a locator who is diligently engaged in the search for minerals (under the doctrine of *pedis possessio*) at the date of the issuance of a prospecting permit should also be excluded from the ambit of the permit because of the "unclaimed" language. There are significant differences in the language of the Stock-Raising Homestead Act and the Mineral Leasing Act which cause me to not include mining locations held by *pedis possessio* in the statutory exclusion of secs. 2(b) and 9(b). The Stock-Raising Homestead Act allowed entries on "unappropriated, unreserved" lands, 43 U.S.C. § 291 (1976), while the Mineral Leasing Act allows the issuance of prospecting permits for "unclaimed, undeveloped" lands, 30 U.S.C. §§ 201(b) (1970) and 211(b) (1976). Under the Mining Law of 1872, the source of title to a mining claim is the discovery of a valuable mineral and appropriation in accordance with statutory requirements. *O'Reilly v. Campbell*, 116 U.S. 418 (1886). Location represents an appropriation which segregated lands for the purposes of the Stock-Raising Homestead Act, but that appropriation must be coupled with discovery of a mineral to make the land subject to a mining claim for the purposes of the "unclaimed, undeveloped" language of the Mineral Leasing Act. Thus, the doctrine of *pedis possessio* does not work a further exclusion from the class of lands that may be included in a prospecting permit.

permit tracts. If, upon the assertion of a superior right by the mining claimant, those existing locations were shown to be valid at the time the permit was issued the permit would be invalid to that extent. This could be accomplished by administratively initiated adjudication or by waiting for the mining claimants to make a showing of the pre-existing validity of their claims.

The rule is potentially distinguishable, however, in that prospecting permittees were not required to furnish evidence of prior occupation or appropriation with their permit applications. This difference can be traced to the statutes involved. Sec. 2 of the Stock-Raising Homestead Act, 43 U.S.C. § 292 (1976), requires an affidavit as to the character of the land.[10] Absent such showing by a prospecting permit applicant,[11] the presumption of regularity should not be given to the subsequent prospecting permit applicant and, hence, the burden would not shift to the mining claimant.

This argument has not been adopted by the Department, however. In the case of oil and gas leases, the Department has followed the rule that if the tract books of the General Land Office show the land to be free from adverse mining claims and subject to lease, then the issuance of the lease is regular and is prima facie valid. *Ohio Oil Co. v. Kissinger*, *supra*; *A. V. Toolson*, 66 I.D. 48 (1959) (appellants unsuccessfully contended that rejection of a mineral patent application because of existence of an oil and gas lease was improper, claiming pre-existing valid claims).

Thus the possible existence of a mining claim for which no patent application has been filed does not prevent the issuance of a lease under the Mineral Leasing Act for minerals not subject to the "unclaimed, undeveloped" language. If, at a later time, the mining claim is shown to be valid prior to lease issuance, the oil and gas lease must be cancelled. *Marion F. Jensen*, 63 I.D. 71 (1956); *Ohio Oil Co. v. Kissinger*, *supra*. Both the claim and the lease can exist on the same land until the mining claimant comes forward to assert his interests.

While the procedural method used in the past was to await the assertion of a superior pre-existing right on the part of a conflicting claimant, the Secretary is not limited to this method of establishing the validity or status of indi-

[10] A question arises here as to whether the Department is estopped from retroactively asserting, by regulation under the authority of *Kern Oil Co.*, *supra*, the need for such a showing by an individual currently holding a prospecting permit. If the Department is not estopped, requiring such a showing may operate to invalidate portions of an individual's permit. The contention that this may involve a deprivation of property can be answered by the fact that the statute operates to invalidate portions of the permit and not the requirement for a showing. In the future, this showing should be required by means of a title abstract to be filed with permit applications.

[11] The affidavit of 43 U.S.C. § 292 (1976) is required to accompany applications to enter unappropriated public lands which have not been designated as subject to entry. The affidavit acts as a temporary classification of the lands, reserving them from other forms of appropriation.

vidual claims to the public domain. See *Boesche v. Udall*, *supra; Cameron v. United States*, *supra.* In those instances where leases have been issued for lands which were not available for leasing under the Mineral Leasing Act, the proceedings which have culminated in cancellation of the improperly issued lease have been initiated by the BLM either: on its own motion, *Oil Resources, Inc.*, *supra;* because of notification of land's true status by the Geological Survey, *David A. Provinse*, *supra;* or because of protests lodged by third parties, *Amerada Hess Corp.*, *supra; Marion F. Jensen*, *supra.*

Waiting for a mining claimant to come forward to contest the validity of the permit does not further the purpose of the "unclaimed" limitation. That limitation is designed to prevent knowledge gained by the mining claimant from ripening into a noncompetitive coal or phosphate lease. If the mining claimant is the same entity as the prospecting permittee, then the claimant's incentive is not to come forward to protect his claim. Even if the claimant and the permittee were not the same, this approach would still encourage permittees to pay claimants not to come forward to assert the validity of their claims.

In order to carry out Congress intent that coal and phosphate prospecting permits only be issued for "unclaimed, undeveloped" lands, the Department must require the permittee to establish the invalidity of the claims found.

In response to the 1977 *Solicitor's Opinion*, the Bureau of Land Management requested each holder of a noncompetitive (preference right) coal or phosphate lease application to submit abstracts showing the presence or absence of mining claims in the lands covered by the application on the date the prospecting permits was issued. Bureau of Land Management Instruction Memorandum No. 77-410 (Aug. 18, 1977). For the purpose of establishing the permit's status, a presumption of validity for any mining claims that are revealed should be adopted. Likewise, it would be presumed that drilling and development had occurred on any oil and gas leases shown. I note that some of the lands involved appear to be covered by locations which do not appear to have ever been valid mining claims. Although the abstract submitted by the noncompetitive (preference right) lease applicant shows that a notice or certificate of location was found in the County Recorder's Office, I have been informed that in some cases corner markers cannot be found, and that discovery shafts or other evidence of mining activity is not evident. As noted above, a mining claim which was not at the time of permit issuance supported by the discovery of a valuable mineral deposit does not render lands "claimed" within the meaning of the statutory provision.

I conclude that the practical way to establish the status of lands covered by a prospecting permit is to

allow a noncompetitive (preference right) lease applicant to bring a private contest proceeding to establish the invalidity of any mining claims shown in the abstract submitted or to show the lack of the sort of development activities identified in this Opinion on mining claims or other mineral leases. In the event that the lease applicant does not prosecute private contest proceedings or come forward with evidence showing the lack of development, the Bureau of Land Management should issue a Notice of Intent to Reject accompanied by a show cause order. This order could be rebutted by the lease applicant coming forward at that time with evidence showing no development, or a claim's invalidity, or both. Land adjudicated to be within the boundaries of a valid legal claim or in the smallest legal subdivision affected by development is to be excluded from consideration in the adjudication of a noncompetitive (preference right) lease and may not be included in any such lease issued.

5. *Are There Any Exemptions From the Statutory Provision as Construed in the Opinion?*

A. *Is a Bona Fide Purchaser of a Prospecting Permit In a "Claimed" or "Developed" Area Exempt from the Opinion?*

Sec. 27(h)(2) of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 184(h)(2) (1976), provides:

> The right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or *permit* which lease, interest, option, or *permit* was acquired and is held by a qualified person * * * in conformity with those provisions, even though * * * his predecessor in title * * * may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. [Italic's supplied.]

Congress enacted sec. 27(h)(2) of the Mineral Leasing Act in 1959 in response to expressions of hesitancy by the oil and gas industry to make necessary investments where there was a "danger that in the chain of title of a lease one of its prior holders may have been in violation of the acreage limitation or other provisions of the Act and that the lease might be subject to cancellation for this reason." H.R. Rep. No. 1062, 86th Cong., 1st Sess. 3 (1959).

While Congressional concern was prompted by pending administrative proceedings against lessees in violation of acreage limitations, the language employed in the statute and in the legislative history is broad enough to cover other violations of Mineral Leasing Act provisions. *J. Penrod Toles*, 68 I.D. 285 (1961); *Southwestern Petroleum Corp.* v. *Udall*, 361 F.2d 650 (10th Cir. 1966). It thus applies where

the predecessor in interest of a bona fide purchaser (BFP) fails to include all land available for leasing in his application, *J. Penrod Toles*, *supra*, or where an application for lease fails to identify applied for lands correctly, *Duncan Miller*, A-30600 (Dec. 1, 1966). The provisions of sec. 27(h)(2) do not, however, invest an individual with BFP rights in cases where only an offer to lease, prior to lease issuance, is assigned. *Herman A. Keller*, 14 IBLA 188 (1974); *Leon M. Flanagan*, 25 IBLA 269 (1976).

The Interior Board of Land Appeals has also distinguished between violations of the statutory provisions which cause the lease to be voidable and those instances where the lease is void. In the latter instance, sec. 27(h)(2) provides no protection. *Oil Resources, Inc.*, 14 IBLA 333 (1974); *Skelly Oil Co.*, 16 IBLA 264 (1974), *rev'd on other grounds*, *Skelly Oil Co.* v. *Morton*, Civ. No. 74-411 (D.N.M. 1975). In *Oil Resources, Inc.*, a noncompetitive oil and gas lease which was issued for lands in a wildlife refuge which was closed to leasing was held a nullity. Since this lease was a nullity from its inception, the subsequent purchase in good faith and for value was held not sufficient to invest the purchaser with the protection of BFP status. Likewise, in *Skelly Oil Co.*, 16 IBLA 264, a noncompetitive lease for lands held to be in a known geologic structure at the time of lease issuance was cancelled as a nullity, with the same result as in *Oil Resources, Inc.* obtaining for a subsequent purchaser.

While the foregoing cases discuss cancellation of leases, sec. 27(h)(2) of the Mineral Leasing Act expressly applies to permits as well, and therefore the conclusions reached with respect to leases apply to permits. Applying the foregoing to a prospecting permittee in light of the 1977 *Solicitor's Opinion* on "unclaimed, undeveloped," it becomes apparent that the classification of the permittee's interest as void or voidable is dispositive of the issue whether a purchaser of such a prospecting permit can enjoy the protection of the BFP provisions. The limitation that prospecting permits may be issued only on land which is "unclaimed, undeveloped" deals with the character of the land to which the permit may attach. In this regard, it is a condition of the land like the status of the wildlife refuge withdrawn from leasing and the known geologic structure subject only to competitive leasing. A permit embracing lands which are not "unclaimed, undeveloped" is therefore incapable of conveying a mineral interest under the terms of the statute; any permit purporting to convey a mineral interest is a nullity to that extent. Following the reasoning of *Skelly Oil Co.*, *supra*, and *Oil Resources, Inc.*, *supra*, the same conclusion must be drawn with respect to the status of a good faith purchaser for value of a prospecting permit issued in violation of the

statutory "unclaimed, undeveloped" limitation upon the Secretary's authority to issue permits. In such a case, the BFP provisions of section 27(h)(2) of the Mineral Leasing Act do not provide protection from permit cancellation or lease application rejection.

B. *Should Permittees or Lease Applicants Who Have Made Substantial Expenditures Prior to These Opinions Looking to the Development of a Preference Right Lease Be Exempt from the Opinion?*

It has been suggested that the earlier Opinion, which exempted previously issued preference right coal and phosphate leases, should also exempt preference right lease applicants who have made substantial expenditures subsequent to the expiration of their prospecting permit on the strength of their belief that a preference right lease for coal or phosphate would be issued to them.

The fact that these prospecting permits are void ab initio to the extent they embrace lands which are "claimed" or "developed" as defined in this and the earlier Opinion, and not merely voidable (see discussion in part 1, *supra*) weighs against the adoption of an exemption to the application of these Opinions on the basis of some sort of substantial expenditures test. Further, it is well established that past erroneous advice or acts by employees of the Department which do not constitute affirmative misconduct will not work to create an estoppel or create rights not authorized by law. *United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978) *cert. denied*, 99 S. Ct. 2838 (1979); *Atlantic Richfield Co.* v. *Hickel*, 432 F.2d 587 (10th Cir. 1970); *Verner F. Sorenson*, 32 IBLA 341 (1977); *Grady C. Price, Jr.*, 17 IBLA 98 (1974). In an analogous case arising under the mining law, it was held that the fact that a mining claimant had held his claim for many years and performed work on it did not estop the Government from challenging the validity of that claim. Nor was the Government estopped because of its alleged failure to advise the claimant that the land embraced in the mining claim was closed to mining. It was the locator's duty to exercise care in ascertaining the status of the land. *Arthur W. Boone*, 32 IBLA 305 (1977).

Additional difficulty in the adoption of such an exemption lies in the nebulous nature of the substantial expeditures test itself. Should "substantial" be defined as a percentage of an entity's net worth, or should it be an absolute dollar figure? Should one time expenditures count as heavily as several smaller expenditures over a longer period of time? What kind of expenditures should be counted—planning activities; environmental studies, equipment orders, admin-

istrative, and personnel costs? Some expenditures by the permittee are necessary whether there is a reasonable expectation of a preference right lease or not, and drawing a line between these and others undertaken specifically in asserted reliance on expectation of lease issuance is difficult if not impossible.

Given the legal reasoning of this and my prior Opinion, as well as the practical difficulties in fairly establishing a substantial expenditures exemption, I do not believe an exemption to the operation of this and the previous Opinion on the basis of substantial expenditures in mistaken reliance on or expectation of the issuance of a preference right lease is required or appropriate.

Conclusion

I reiterate the conclusions previously expressed in this memorandum.

(1) A prospecting permit which embraces land which is not "unclaimed" and "undeveloped" is a nullity and void as a conveyance of any interest in that land.

(2) Land in a mining claim remains "unclaimed" land for the purposes of M–36893 so long as the claim was not validated by discovery of a valuable locatable mineral deposit at the date of permit issuance.

(3) Surface disturbing mineral activities, associated with delineation of a mineral ore body which could reasonably be expected to disclose knowledge of an area's coal or phosphate potential constitution development.

(4) The BLM should presume the validity of mining claims or the development of mineral leases disclosed by abstracts submitted by the preference right lease applicant, and allow the applicant to pursue the remedy of private contests or, failing that, issue a notice of intent to reject the lease application where claims or development are shown, and allow the preference right lease applicant the opportunity to show, on the record, the invalidity of the claims, or lack of development, or both.

(5) The BFP provisions of sec. 27(h)(2) of the Mineral Leasing Act do not apply to permits which embrace land that is claimed or developed.

(6) No exemption from any earlier opinion or this one should be established for preference right lease applicants who have expended substantial funds subsequent to the expiration of a prospecting permit in the expectation of securing a preference right lease.

This Opinion was prepared with the assistance of Frederick N. Ferguson, Deputy Solicitor, John D. Leshy, Associate Solicitor for Energy and Resources, Robert Uram (formerly Assistant Solicitor, Branch of Onshore Minerals), Larry McBride, and Kenneth Lee of the Division of Energy and Resources.

LEO KRULITZ,
Solicitor.

H. J. ENEVOLDSEN

44 IBLA 70

Decided *November 20, 1979*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, disqualifying oil and gas lease offer for Parcel WY 2438.

Affirmed as modified.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest

Under the Departmental regulations an offeror in a simultaneous oil and gas lease drawing must sign a statement that he is the sole party in interest, or, if not, submit the statement required by 43 CFR 3102.7. Failure to comply with the regulation requires rejection of the lease offer.

2. Administrative Practice—Administrative Procedure: Adjudication—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First Qualified Applicant—Rules of Practice: Protests

Where a protest, with accompanying supporting evidence, alleges that the oil and gas lease offer drawn first in a simultaneous-filing-drawing procedure violated the regulations because a party in interest was not disclosed and there was a multiple filing, the Bureau of Land Management should first afford the drawee an opportunity to respond to the protest before rejecting the offer based on facts alleged in the protest. The error, however, is rendered harmless where on appeal the offeror has full opportunity to make factual submissions and respond to the allegations.

3. Contracts: Generally—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest—Words and Phrases

"Interest in an oil and gas lease or offer." If an oil and gas lease offeror in an oral agreement gives another person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an interest in the lease or lease offer which must be disclosed under 43 CFR 3102.7. That an offeror might raise a technical legal defense against enforcement of such an agreement in a court does not militate against there being a claim or avoid the consequence of the disclosure regulation or 43 CFR 3112.5–2 prohibiting multiple filing in drawing procedures.

4. Contracts: Generally—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest—Words and Phrases

"Interest in an oil and gas lease or offer." Where affidavits submitted on appeal by an oil and gas lease offeror disclose that prior to the filing of an oil and gas lease offer the offeror orally agreed to give the person filing the offer for him either the opportunity to refuse to purchase the lease under terms and conditions that a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy), the offeror has given the person an interest in the offer as defined in the regulations to include a prospective claim to an advantage or benefit from a lease.

APPEARANCES: Earl H. Johnson, Esq., Denver, Colorado, for appellant; Don M. Fedric, Esq., Hunker-Fedric, P.A., Roswell, New Mexico, for protestant; Patricia Boleyn Walker, Esq., Office of the Regional Solicitor, Depart-

ment of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

H. J. Enevoldsen, of Potter, Nebraska, appeals from the letter decision dated Mar. 7, 1979, by the Wyoming State Office, Bureau of Land Management (BLM), disqualifying his offer to lease Parcel WY 2438. Enevoldsen's offer won first priority in the Wyoming State Office's Dec. 1978 simultaneous oil and gas lease offer drawing. Appellant's offer was disqualified based on evidence submitted by Shackelford Reeder, the number two drawee, protestant, which BLM found to show that appellant was not the sole party in interest for the parcel and that he failed to comply with the disclosure requirements of 43 CFR 3102.7.[1]

In his letter of protest protestant charged that there was an agreement or understanding between appellant and a Joseph Sprinkle of Denver, Colorado, which gave Sprinkle "an interest or a claim or prospective claim to an advantage or benefit from any lease to be issued to Enevoldsen," in violation of 43 CFR 3102.7 and 3112.5–2. Protestant based this charge on a considerable amount of evidence, including three affidavits to support the charges.

Without allowing appellant an opportunity to rebut the evidence submitted with the protest, BLM issued its decision disqualifying appellant's offer. On appeal, appellant asserts this failure as error. Appellant further asserts that he was and is the sole party in interest in his lease offer and that protestant's evidence, which BLM accepted, is circumstantial and irrelevant. He submitted numerous affidavits which challenge and deny the veracity of protestant's evidence.

The record reveals the following facts and circumstances. Protestant first became suspicious when a Philip Donaldson of Grand Blanc, Michigan, contacted him. Donaldson told protestant, as set forth in his affidavit, that when he tried to contact appellant to discuss buying the lease, he was referred to appellant's father who said the lease was not for sale and refused to give him appellant's address. Appellant's sister-in-law referred Donaldson to Sprinkle, stating, "[T]he last time they won a Lease, he got it" (Affidavit of Donaldson). Donald-

[1] 43 CFR 3102.7 provides:

"§ 3102.7 Showing as to sole party in interest.

"A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is cancelled."

son checked the Rocky Mountain Petroleum Directory for Sprinkle, and found "Joseph S. Sprinkle Oil Leases," in Denver, Colorado. He then contacted the second drawee, protestant.

Protestant's check of BLM records indicated that in the past other residents of Potter, Nebraska, had assigned leases in very active leasing areas to Sprinkle, retaining unusually low overriding royalty interests. Protestant hired a private investigator, James D. Visser, to contact appellant personally and to determine if any agreement existed between appellant and Sprinkle.

In his affidavit, Visser states that appellant "agreed that he had filed the entry card on behalf of Mr. Sprinkle, and stated that he had been entering the lottery for the last four years for Mr. Joe Sprinkle." According to Visser, appellant told him, "I think we get 50% or something" when questioned about the financial arrangements, and did not know if his father or Sprinkle paid the filing fee. Visser also contacted appellant's father, Don Enevoldsen. He states the father told him, "We have all signed cards for years for Joe Sprinkle." Protestant states that Don Enevoldsen refused to divulge the financial arrangements he had with Sprinkle.

Protestant also hired Esther R. Evans of Laramie County, Wyoming, to search the BLM records relating to oil and gas leases in Wyoming. She found that five applicants who filed on Parcel WY-2438 had won leases in the past and assigned them to Sprinkle, retaining overriding royalty interests of ½ to 1 percent. Based on this evidence submitted by Protestant, BLM disqualified appellant's offer.

On appeal, appellant asserts no other person had an interest in the lease. He submitted affidavits from himself, his father, Joe and Mary Sprinkle, and nine persons who have assigned leases to Sprinkle. These affidavits are discussed, *infra*. For our purposes here, it is sufficient to say that the affiants (other than the Sprinkles) generally state they give Sprinkle a right of first refusal to purchase the lease, but that he has no interest in the lease and they do not have to sell to him.

Protestant filed an answer to appellant's statement of reasons, asserting that appellant's affidavits support a finding of a scheme to allow Sprinkle a better chance to obtain leases. He states that Sprinkle's " 'sponsored applicants' do not appear to pay filing fees; do not select the parcels filed upon; do not pay rentals; immediately sell any lease won by them to Sprinkle; and retain a noncustomary, nominal overriding royalty interest." He suggests the offerors "understand they must sell to Mr. Sprinkle for that is the 'quid pro quo' for his all-encompassing assistance in placing the applicants in filings." Protestant argues that this right of first refusal contains all the essentials for a contract, is akin to an option, and gives rise to legal and equitable remedies for breach. Protestant sub-

mitted affidavits from an independent consulting geologist and two other disinterested parties, all familiar with oil and gas leasing practices in Wyoming. All three agree the ½ to 1-½ percent overriding royalty paid by Sprinkle is abnormally low. Two or three percent is generally expected in highly speculative areas, while 5 percent is considered standard.

The attorney for BLM submitted a motion for expeditious review of the case and also, submitted a brief in support of the State Office's position. First, she asserts that even if BLM should have given appellant an opportunity to be heard prior to issuing its decision, the error was harmless because appellant and Sprinkle both admit Sprinkle had a right of first refusal. Second, she argues this right is an "option" and thus explicitly violates 43 CFR 3100.0–5(b). The fact that "Sprinkle's interest is contingent upon the sale of the lease interest by Appellant which is controlled by Appellant, * * * does not preclude Mr. Sprinkle from holding an 'interest' within the meaning of 43 CFR 3100.0–5(b)." [2]

Appellant submitted a reply brief to protestant's and the Government's arguments. Both protestant and the Government stated that the facts here show a violation of both the sole party in interest requirement, 43 CFR 3102.7, and the prohibition against multiple filing, 43 CFR 3112.5–2. Appellant initially points out that the decision appealed from did not decide the multiple filing issue; therefore, that issue is not involved here. Appellant argues that his use as a layman of the phrase "right of first refusal" has significance only in terms of the intent of the parties, there being no written agreement involved. Appellant, his father, Sprinkle, and the other affiants all assert that Sprinkle has no rights whatsoever in the leases he helps them win. Appellant asserts the statements in their affidavits negate the existence of any contract, agreement or scheme.

Finally, protestant submitted a response to appellant's reply stating that Sprinkle's interest need not be called, or even defined as, an option for it to violate the regulations. He states: "It does not matter that Enevoldsen might not have sold the

[2] 43 CFR 3100.0–5(b) provides:

"(b) *Sole party in interest.* A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An 'interest' in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such 'interests.' Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an 'interest' in such lease."

lease, or might have attempted to refuse to honor Sprinkle's claim, for 43 CFR 3100.0–5(b) requires *disclosure* of the existence of an agreement giving another party an interest in the lease." Protestant last notes that he has contended that the Sprinkle applicants pay neither the $10 filing fee nor any service fees to Sprinkle; do not reimburse Sprinkle for filing fees paid by him; do not select the parcels; do not pay the rentals when leases are won; and immediately sell leases they win to Sprinkle, retaining unusually low overriding royalty interests. Appellant has not responded to these contentions, nor has he disclosed the amount of the bonus paid for the lease. Viewing all the facts, protestant concludes that the existence of a "scheme to give Sprinkle an advantage in the drawing is quite clear, and both 43 CFR 3102.7 and 43 CFR 3112.5–2 have been violated."

[1] Under the Departmental regulations, an offeror in a simultaneous oil and gas lease drawing must sign a statement that he is the sole party in interest, or submit the statement required by 43 CFR 3102.7 if there are other parties in interest. Failure to comply with this regulation requires rejection of the lease offer. *Alfred L. Easterday*, 34 IBLA 195 (1978).

[2] The BLM decision rested on a finding that this regulation was violated because Sprinkle held an interest in appellant's offer which was not disclosed on the offer. This finding was made solely from the information in the protest filed with the BLM office Mar. 6, 1979. The BLM decision issued the next day, on Mar. 7, 1979. We agree with appellant to the extent of stating that this action by BLM was premature and procedurally improper in this case. BLM's decision was based upon alleged statements of the appellant and others not made in writing to BLM, but made to another person and reported by that person. The facts alleged were in charges made by a protestant not reflected in the record except in the protest materials.

Although it has been recognized that there is no vested right in an oil and gas lease offeror to a lease if the United States decides not to lease the land within the offer (*e.g.*, *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Duesing* v. *Udall*, 350 F. 2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966)), it is also clear that if the United States does lease land, the first qualified applicant has a preference right to a lease which cannot be abused by leasing the land to another in violation of the statute and regulations. *E.g.*, *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955).

Usually, problems in determining whether an offeror was the first qualified offeror for a parcel of land can be resolved on facts shown by the official records, particularly the showings of the applicant. Thus, where an offer is not accompanied with essential showings under the regulations it is apparent from the record that the offer must be re-

jected. There is no factual dispute involved, only a legal conclusion to be drawn from the facts in the record. The case before us, however, is different from the usual case because the BLM decision rested upon asserted facts stated in a protest. Basic due process concepts of fairness should have been followed by BLM here. At the very minimum, appellant should first have been afforded the opportunity to respond to such allegations and to rebut the facts stated in the protest before BLM rejected the offer. *Cf. Stickelman* v. *United States*, 563 F. 2d 413 (9th Cir. 1977).

BLM's error in this case is now rendered harmless because it is true, as BLM's counsel has indicated, that this appeal process has afforded appellant an opportunity to present information to rebut the facts alleged in the protest, and he has attempted to do so by submitting affidavits. It is also true, as appellant contends, that the protestant and Government's counsel have raised issues in addition to that decided by the decision below. These go to the viability of appellant's offer, however, and appellant has had opportunity to address those issues in the briefs filed with this Board and has done so. Were there a clear dispute on basic facts determinative of the legal issues posed therefrom, we would order a fact-finding hearing in this case before an administrative law judge pursuant to 43 CFR 4.415. However, in view of the sworn statements submitted by appellant and others concerning the arrangement with Sprinkle, we see no basic fundamental factual dispute, only minor factual discrepancies. The main dispute is over the legal significance of the stated arrangement. Thus, we believe the present record affords an adequate predicate for our determination of the crucial issues raised by the appeal.[3]

[3] The fundamental question, upon which the other issues rest, is whether Sprinkle had an interest in the offer and lease to be issued as prescribed in regulation 43 CFR 3100.0–5(b). As defined therein, an "interest" covers a broad range of rights in an offer or lease,including "[a]ny claim or any prospective or future claim to an advantage or benefit from a lease." *See* n.2. It is the protestant's and BLM's position that the affidavits submitted by appellant on appeal referring to Sprinkle's "right of first refusal" establish that Sprinkle did have such an interest in the lease. Appellant has attempted to explain away the use of this language in the affidavits by referring to other language therein to show there was no enforceable agreement with Sprinkle whereby the offer had to be assigned by appellant to Sprinkle.

[3] We note that appellant has not submitted anything that would indicate that a hearing in this case might be productive of a different result. As will be indicated *infra*, he has not endeavored to show what was intended by the language used in the affidavits of "right of first refusal." Furthermore, he has not denied that Sprinkle paid the filing fees for himself and others. This fact, unrefuted, strongly supports an inference that Sprinkle had more than a mere hope or expectation to purchase a winning lease since the normal expectation is that a person would not pay filing fees as a gratuity, but would as a consideration for a benefit to be obtained.

Appellant contends no enforceable contract existed between Sprinkle and appellant which would give Sprinkle any right or interest in the lease. He contends that many Departmental decisions require that there be an enforceable contractual right before a third person is deemed to have an interest in a lease offer. The cases cited involve relationships between oil and gas lease services and offerors where the written agreements between them permitted the offeror to sell the lease to the service at the offeror's option. The question was whether the services had an interest. It has been held that unless the contract provided that the offeror must sell to the service, the service did not have an interest. *See, e.g., Kelley Everette*, 41 IBLA 155 (1979); *Jack Mask*, 41 IBLA 147 (1979), and cases cited therein. In those cases there was no asserted "right of first refusal" in the service company. There were definite written agreements specifying the various rights of the parties between themselves. There was a clear option in the offeror, but not in the filing service company. These cases are clearly distinguishable from the instant case. Here, apparently, we have no specific written contract. Appellant has asserted that there existed only an oral understanding.

The fact that an agreement or understanding between the parties is oral makes no difference in considering whether there has been a violation of the regulations. Under 43 CFR 3102.7, if there are other parties interested in the offer separate statements must be signed by them and the offeror "setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written." If the oral agreement would give a person "a claim or any prospective or future claim to an advantage or benefit from a lease," there would be an "interest" in the lease as defined by 43 CFR 3100.0–5 (b). The regulation uses the word "claim." This connotes something less than a right which may be successfully enforced in the courts. For example, if a party to an agreement asserts there is no enforceable contract because he could raise a statute of frauds defense in the courts, this does not change his status under this regulation nor under 43 CFR 3112.5–2, which pertains to multiple filings. The party still has a "claim" to an advantage or benefit from a lease, and cannot by a "bootstrap" argument of a possible technical legal defense avoid the consequence of the clear purpose of the regulations to have such interests disclosed and to forbid multiple filings by parties in the same drawings who have such interests. Compare *Foote Mineral Co.*, 34 IBLA 285, 85 I.D. 171 (1978) (presently on appeal in the courts), where it was held, *inter alia*, that the United States may assert a claim and determine the underlying obligation for royalties, even though a defense (in that case, the statute of limita-

tions) against collection of some of the royalties could be asserted in court proceedings.[4]

Thus, the important determination to be made is whether Sprinkle had a "claim" to an advantage or benefit from a lease, and not whether he could successfully enforce the agreement in a court.

[4] Appellant has requested that we consider all of the statements in the affidavits submitted to support his position and not take one statement out of context. We have examined all of the affidavits in connection with appellant's contentions and have carefully considered the statements therein in their entire context. Despite appellant's shifting position in trying to explain away the use of the term "right of first refusal," all the information submitted tends to show that Sprinkle and appellant had an oral understanding or agreement which could come within the definition of an "interest" in the lease.

In Sprinkle's affidavit he states he handles the filing of the entry cards for appellant as well as other members of his family and other friends and members of "our family." He then states:

> I do not have with them nor do they have with me any prior arrangements as to the sale of any oil and gas leases that they may win.
>
> I have verbally committed to make an offer and I have been assured that my offer would receive early consideration as to its adequacy. My wife, Mary, has authority to act in my behalf.

The latter statement takes away much of the import of the first statement above quoted. Sprinkle has promised to make an offer. Clearly it was appellant's and Sprinkle's understanding that Sprinkle would offer to buy any lease in the drawing which appellant would win, and that "early consideration as to its adequacy" would be given by the offeror.

In appellant's affidavit he states that his father explained to him that Sprinkle would handle the "mechanics of the filing" if appellant desired to participate in the oil and gas lease drawings as other family members had done with Sprinkle's help. Appellant states further:

> He explained that I could do so by signing entry cards and giving them to Mr. Sprinkle. Mr. Sprinkle asked for the right of first refusal to purchase the lease. I could sell it to him if I wanted to, but I did not have to. I was perfectly free to sell it to whomever I wanted.

Later in the affidavit he states that he in no way intended to give the private investigator the impression that he was filing on behalf of Sprinkle or that he has been "entering the lottery for Mr. Joe Sprinkle."

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[4] In a different context, in a case involving a conspiracy to acquire patents of desert land under laws limiting the acreage an individual could acquire, it was argued that an oral, undisclosed understanding between desert land entrymen and others would not be a legally enforceable contract. *Reed* v. *Morton*, 480 F. 2d 634, 641 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064. It was held that there was, nevertheless, sufficient proof of a scheme or conspiracy which year violated the laws. In specifically addressing the argument, the court stated:

"But secret 'arrangements' and 'understandings,' like more formal contracts to pass title to desert land grants after patents, undermine the Interior Department's power and duty to enforce the restrictions on the recipients of the government's bounty." *Id.*

The affidavit by appellant's father, D. W. Enevoldsen is basically of the same import. The most relevant portions of his affidavit read:

> For many years I have made applications for oil and gas leases in the Federal Simultaneous Filings. I first became aware of the filings through relatives of mine who are relatives of Joe and Mary Sprinkle. I and other members of my family contacted them to determine if we were eligible to participate in the filings. We were informed that if we would execute the entry cards, the other details would be handled for us by Joe and Mary Sprinkle. The only request that they made of us was that if any of us won, we would let them make an offer and give them the right of first refusal.

With regard to his conversation with the private investigator he stated:

> He [the investigator] said, "You are signing cards for Joe Sprinkle," and I said "No, you are putting words in my mouth." I asked him if this was the way that he talked to my son. He kept saying, "Is it true you and your son are signing for Joe Sprinkle?" I kept repeating, "We sign the entry cards for ourselves and we are the only people who have an interest in the leases and we can sell to whomever we want." He kept using phrases such as "But you do sign cards for Joe Sprinkle" and "You are doing this for Joe Sprinkle." I kept telling him that he was misinformed and finally I became rather irritated and told him if he wanted some more information, he could talk to Joe Sprinkle or anyone he wanted, but I did not want to talk to him anymore.

Nine other affidavits were submitted by relatives or friends. They are identical and state:

> I was at no time nor am I now obligated to transfer any interest to anyone in any oil and gas lease that I have won or may win as a result of any simultaneous drawing conducted by the Bureau of Land Management.
>
> Joseph Sprinkle advises me and handles the filing of my application. I have agreed verbally that in the event I am successful, he will have the right of first refusal to purchase the lease. He has agreed to assist me in selling the lease in the event he does not purchase it.
>
> I, at all times, have and have had the sole right to sell to whomever and at whatever price I desire and no one has or has had any right to any portion of any lease I have applied for.

The arrangement or understanding of these nine affiants with Sprinkle appears to be similar to that of appellant.

Appellant contends that, at most, his arrangement with Sprinkle could give rise merely to a "hope or expectation" in Sprinkle and not an "interest" in the lease, and that by decisions of this Board in such circumstances the offeror is the sole party in interest and there is no violation of the regulations. *E.g.*, *Virginia L. Jones*, 34 IBLA 188 (1978); *D. E. Pack*, 30 IBLA 230 (1977); *Harry L. Matthews*, 29 IBLA 240 (1977); *R. M. Barton*, 4 IBLA 229 (1972); *John V. Steffens*, 74 I.D. 46 (1967). In none of these cases, however, was there an agreement that the offeror gave the agent filing the cards a "right of first refusal." They are all distinguishable from the situation here.

Although the affiants used the term "right of first refusal," appellant now says there was no prior agreement of a "right of first refusal" vested in Sprinkle. He con-

tends that appellant did not use the phrase in its legal or technical sense because qualifying language negates such an intent, specifically, his statement that "I could sell it to him if I wanted to, but I did not have to. I was perfectly free to sell it to whomever I wanted * * *." We do not agree that this statement coupled with all the information in the affidavits establishes that Sprinkle had no claim to an advantage or benefit from the lease. Appellant's excuse that he is a lay person and would not understand technical terms is not persuasive here. Apparently the affidavits were prepared with the help of an attorney, or at least, they were reviewed by an attorney in submitting them as proof of the arrangement between the parties.

Appellant points to court cases which use "right of first refusal" in a technical sense to mean that the person having the right would have the right to meet any bona fide offer of a third party at the same price and on the same terms and conditions as those in the offer by the third person, if the person giving the right decided to sell. *E.g.*, *Turner* v. *Shirk*, 364 N.E.2d 622 (Ill. App. 1977); *Bennett Veneer Factors, Inc.* v. *Brewer*, 441 P.2d 128, 134 (Wash. 1968); *Brownies Creek Collieries, Inc.* v. *Asher Coal Min. Co.*, 417 S.W.2d 249 (Ky. 1967); *Tamura* v. *De Iuliis*, 281 P.2d 469 (Ore. 1955). Appellant contends that the right of first refusal is not an "option," quoting from *Coastal Bay Golf Club, Inc.* v. *Holbein*, 231 So.2d 854 (Fla. 1970), at 857, wherein the court stated: "That right is clearly an executory right. It is therefore not an option because an option is an executed contract." Appellant has cited additional cases to the same effect pointing out that the right of first refusal is not a true option because a lessor has the right to retain the property and not to sell to anyone. However, as clearly pointed out in most of these cases cited above, and as expressly quoted by appellant from *Bennett Veneer Factors, Inc.* v. *Brewer*, *supra* at 132:

> **In a preemptive right contract, sometimes called a "first refusal" right, there is an agreement containing all essential elements of a contract, the terms of which give to the prospective purchaser the right to buy upon terms established by the seller; *but only if the seller decides to sell.* [Italics by appellant.]**

Appellant then contends that the terms of an oral contract must be "clear, satisfactory, and unequivocal." This requirement is stated in cases involving conflicts between the purported parties to the contract. In our situation it suffices if the evidence simply show an arrangement which violated the regulations.

We agree with appellant that the evidence here does not establish that Sprinkle had an option to purchase the lease, within the usual meaning of the word "option" to mean a definite contract whereby the prospective purchaser has a definite right to purchase, if he chooses to do so under agreed upon conditions, rather than the seller having the election to sell. We do not agree, however, that Sprinkle

obtained no right under the oral agreement with appellant. As indicated, appellant contends his statement that he "was perfectly free to sell it to whomever [he] wanted" negates a right of first refusal. Also, appellant states we must look to the term "right of first refusal" in the entire context of the language in the affidavits. This must be true, also, of appellant's other statement. If we were to accept appellant's argument completely that Sprinkle had no rights at all, we would have to ignore the language of "right of first refusal" and say that it had no significance whatsoever. However, it appears that appellant and members of his family and Sprinkle had an understanding that Sprinkle had some right or privilege because he filed the offers for them. It is clear from Sprinkle's affidavit that he was obligated to make an offer to purchase a winning lease from appellant, but that appellant could refuse Sprinkle's offer if he did not want to sell the lease. What is lacking in appellant's submissions is a specific and clear explanation of Sprinkle's right. We cannot accept appellant's assertion that Sprinkle had no right in view of the statement in his affidavit and in the other affidavits which show a pattern whereby Sprinkle would file the offers for appellant and others, if they would give him a right of first refusal.

The affiants' statements do not expressly state that Sprinkle would have the right to match any other offer made by a third person to appellant. However, the language in the affidavits does not clearly demonstrate that he would not have that right. Such a right is in keeping with the most common legal understanding of the term right of first refusal. The only other possible interpretation which would give some meaning at all to the use of the term is that Sprinkle would be afforded the first opportunity to make an offer to purchase the lease. This is usually called a "first right to buy." *See* 1A. *Corbin, Contracts* §§ 261, 261A (1963). In both circumstances, the person giving the right does not have to sell. However, if he decides to do so, the party to whom the right was given must be given either the opportunity to refuse to purchase under terms and conditions as a third party would make (right of first refusal), or the opportunity to make the first offer before any other offer would be accepted (first right to buy).

While neither of these rights are the equivalent of an option, they are valuable rights which would preclude the lessor from assigning the lease without first giving Sprinkle either the opportunity to make a first offer to purchase, or to match any offer made to the lessor by a third party.[5] The fact that the lessor could choose not to sell the lease does

[5] We appreciate the semantical problems here as the terms do not always have express technical meanings in all factual contexts. The discussion in *Corbin, Contracts, supra*, best explains this. We have used above the most common meanings in light of the factual context presented here. The fact that there may be some ambiguity is caused by appellant's failure to delineate more particularly the arrangement. This should not serve to help his position.

not diminish the right. We find that because Sprinkle had one of these rights he had, at the time offer was filed, an "interest" in the lease offer within the meaning of that term as defined in the regulations to include a prospective claim to an advantage or benefit from a lease. This is far different from an option in the lessor to sell to the agent filing service. In that situation, there is no restraint on alienation of the lease. The lessee may sell to anyone and the agent has no claim against him if he chooses to sell to someone else, without exercising the option to sell to the agent. Under either a right of first refusal or first right to buy discussed above, however, the lessee is restricted in his rights to the lease because he cannot alienate any interest in the lease without complying first with his arrangement with Sprinkle. Thus Sprinkle has an interest in the lease, as defined in the regulations.

In view of the above finding, it is apparent that there was a violation of 43 CFR 3102.7, pertaining to the disclosure of parties interested in the offer and, also, of 43 CFR 3112.5–2, prohibiting multiple filings in a drawing, as Sprinkle filed in the same drawing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the rejection of appellant's offer with the modification made herein that appellant should have been given notice and an opportunity to respond prior to BLM's making the decision.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

APPEALS OF GREGORY LUMBER CO., INC. (ON RECONSIDERATION)

IBCA–1237–12–78
1238–12–78
1239–12–78
1240–12–78

Decided *November 23, 1979*

Contract Nos. OR090–TS7–8, OR090–TS5–49, OR090–TS6–18, OR090–TS6–60, Bureau of Land Management.

Denied.

Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration

The appellant's motion for reconsideration provides no reason for overturning the Board's principal decisions which dismissed the subject appeals for lack of jurisdiction. The Board, having found significant current precedents consistent with the view that the effective date of the Contract Disputes Act of 1978 was Mar. 1, 1979, and that claims appealed to the Board prior to that date were not pending then before the contracting officer, finds those precedents controlling without analysis of all matters argued in appellant's brief.

APPEARANCES: Edward F. Canfield, Attorney at Law, Casey, Scott & Can-

field, Washington, D.C., for appellant; Lawrence E. Cox, Department Counsel, Portland, Oregon, for Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH*

INTERIOR BOARD OF CONTRACT APPEAL

Appellant has filed a Motion for Reconsideration of the Board's decision of Sept. 28, 1979, dismissing the subject appeals on the grounds:

1. Important issues of law and precedent concerning statutory construction argued by appellant in its brief were not discussed by the Board in its decision. These cases deserve comment and analysis.

2. In a similar controversy with respect to the meaning of the terms of the statute, another Board was split with a substantial number of judges dissenting. It is respectfully suggested that consideration by the Board en banc should take place.

3. The rule relied upon by the Board is an interim rule. If the rule is later changed, this dismissal will have prejudiced appellant and leave it without recourse under the Contract Disputes Act.

Appellant's first contention that important issues of law and precedent were not discussed by the Board in its decision belies the basic function of the Board to determine factual issues in contractual disputes and to apply existing law to render a decision on the findings of facts. Although, the question of jurisdiction presented necessarily involves legal questions of statutory interpretation, there exists a significant number of earlier Board of Contract Appeals' decisions and a recent court decision involving the same question of when a claim is "pending then" before the Contracting Officer. Except for dissenting opinions in *Monaco Enterprises, Inc.*, and *Towne Realty, Inc.*, ASBCA 23611 and 23676 (June 6, 1979), 79–2 BCA par. 13,944, the Board decisions are consistent with the view that the language "pending then" as used in the Contract Disputes Act, P.L. 95–563 (41 U.S.C. §§ 601–613 (1976)) means pending before the contracting officer on or after Mar. 1, 1979, the effective date of the Act. This interpretation is confirmed by the Court of Claims in *Troup Bros., Inc.* v. *United States*, Ct. Cl. Order (Aug. 24, 1979), where the contractor was not permitted to elect to proceed with a direct suit under the Contract Disputes Act because the appeal filed with a Board prior to Mar. 1, 1979, was not pending before the Contracting Officer on the effective date of the Act. We conclude that the availability of significant current precedents involving the specific phrase requiring interpretation is controlling without the need or desirability of analyzing all cases mentioned in appellant's brief.

The suggestion that consideration by the Board en banc should take place is denied with the observation

*Administrative Judge Beryl S. Gilmore who authored the principal opinion is no longer a member of this Board.

that a majority of the Board did join in the Sept. 28, 1979, opinion which dismissed the appeals.

The third contention that the Board rule relied on is only an interim rule subject to change that may prejudice the appellant raises a groundless concern that the Board could modify its rule to change the effective date of the Act as expressed in the Act and as interpreted in various Board and court decisions as discussed in the Board's decision of Sept. 28, 1979.

Conclusion

The Board's principal decision of Sept. 28, 1979, dismissing the subject appeals for want of jurisdiction over the particular claims involved is hereby affirmed.

RUSSELL C. LYNCH,
Administrative Judge.

WE CONCUR:

G. HERBERT PACKWOOD,
Administrative Judge.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

BURGESS MINING AND CONSTRUCTION CORP.

1 IBSMA 293

Decided *November 30, 1979*

Appeal by Burgess Mining and Construction Corp. from a decision by Administrative Law Judge Sheldon L. Shepherd which sustained a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement for failure to remove topsoil and to post perimeter markers clearly (Docket No. NX 9-28-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Topsoil: Handling

Absent express approval of an alternative plan by a regulatory authority in the manner provided by law, 30 CFR 715.16 requires no less than all the available topsoil to be salvaged.

2. Surface Mining Control and Reclamation Act of 1977: Signs and Markers

While the initial Federal regulatory program requires that the perimeter of the permit area be clearly marked, there is no definition of permit area applicable during such program; therefore, an interpretation of 30 CFR 715.12(c) that is consonant with the spirit and purposes of the Act will be upheld.

3. Surface Mining Control and Reclamation Act of 1977: Signs and Markers

Signs and markers, whenever required, must be durable and easily recognized.

APPEARANCES: W. E. Prescott III, Esq., Birmingham, Alabama, for Burgess Mining and Construction Corp.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by Burgess Mining and Construction Corp. (Burgess) from the Administrative Law Judge's (ALJ) decision in Docket No. NX 9-28-R which up-

held Violation Nos. 1 and 2 of Notice of Violation No. 79–II–16–4, issued to Burgess by the Office of Surface Mining Reclamation and Enforcement (OSM) for its failure (1) to salvage all topsoil on lands to be affected by mining as required by 30 CFR 715.16, and (2) to mark clearly the perimeter of the permit area in accordance with 30 CFR 715–12. The ALJ held that the evidence presented at the hearing was sufficient to uphold the perimeter markers violation and part of the topsoil violation. We believe that the conclusions made by the ALJ were justified under the circumstances and we affirm his decision.

Factual and Procedural Background

On Feb. 1, 1979, William D. Ellis, a reclamation inspection specialist for OSM, inspected the Burgess surface mining operation in Bibb and Shelby Counties, Alabama.[1] Inspector Ellis was accompanied on the inspection by Burgess superintendent James McCoy. As a result of this inspection, Notice of Violation No. 79–II–16–4 was issued to Burgess on Feb. 1, 1979.[2] Two violations of the Department's interim regulations were specified: (1) the failure of the operator to salvage all topsoil on land to be affected by mining, as required by 30 CFR 715.16; and (2) the failure of the operator to mark clearly the perimeter of the permit area, as required by 30 CFR 715.12. Burgess filed an application for review of the notice on Feb. 26, 1979,[3] and a hearing was held before the ALJ on May 10, 1979.

OSM's assertion that Burgess failed to salvage all topsoil was based on the conditions found by the inspector on Feb. 1, 1979, as reported by him in his testimony.[4] In support of this testimony, OSM introduced Exhibits 3–1, 3–2, 3–7, 3–8, 3–9, and 3–13, photographs of spoil piles partially covering trees. OSM sought to establish that the trees were not removed, and, by inference, that the topsoil was not removed prior to Burgess' disturbance of the area. In addition, OSM introduced Exhibits 3–10, 3–11, and 3–12 (photographs), to show that the upper several inches of the A horizon soil had been scalped from a knoll.

On June 29, 1979, the ALJ issued a written decision which upheld all of Violation No. 2 of the notice (concerning 30 CFR 715.12), but only part of Violation No. 1 (concerning 30 CFR 715.16). With regard to Violation No. 1, the ALJ held that the evidence supported OSM's finding of a failure to salvage topsoil in

[1] This inspection was conducted pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271 (Supp. I 1977), and 30 CFR Part 721 of the Department's interim regulations.

[2] Notice of Violation No. 79–II–16–4 was issued pursuant to 30 U.S.C. § 1271(a)(3) (Supp. I 1977) and 30 CFR 722.12.

[3] Burgess' application for review of the notice was filed pursuant to sec. 525 of the Act, 30 U.S.C. § 1275 (Supp. I 1977).

[4] The testimony most damaging to Burgess was Ellis' account of his conversation with James McCoy, identified by Ellis as the Burgess "superintendent," in which McCoy allegedly stated that topsoil had not been saved since the end of a United Mine Workers' strike on Mar. 25, 1978 (Tr. 20).

the area as shown in Exhibits 3–10, 3–11, and 3–12, but that the evidence did not support that part of Violation No. 1 pertaining to the areas in which trees were partially covered by spoil piles, because there was no evidence that the spoil was placed there after the effective date of the regulations. Burgess filed its appeal with the Board on Aug. 6, 1979, and its brief in support of the appeal on Sept. 7, 1979. OSM filed a reply brief on Sept. 28, 1979.

Discussion

In its appeal from the ALJ's decision concerning the topsoil violation, Burgess raises two major points. They are, in effect, that its method of handling topsoil was legal and that, even if it was not, there was no competent evidence before the ALJ to establish any illegality. We will treat these in the order stated.

[1] We have held that, absent express prior approval to the contrary by a regulatory authority in the manner provided by law, 30 CFR 715.16 requires no less than all the available topsoil to be salvaged. *Carbon Fuel Co.*, 1 IBSMA 253, 86 I.D. 483 (1979); *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979). Burgess asserts, however, that 30 CFR 715.16 permits less than all available topsoil to be salvaged.[5]

Burgess maintains that the language of sec. 715.6(a): "All topsoil *to be salvaged* shall be removed" (italics supplied), leads to the inevitable conclusion that less than absolutely all of the available topsoil need be removed in every case and that circumstances will direct the exact amount that must be salvaged. This suggestion appeals to common sense, but even so, any deviation from the norms set forth in the regulations cannot be based on secrets locked away in the heart or mind of the individual operator. Rather, it must be an exception authorized by law upon the approval of the appropriate regulatory authority. Burgess has done nothing more than nakedly assert that it was not required to salvage all of the topsoil; it has not suggested that its conduct was approved pursuant to any right a regulatory authority might have under law to grant such approval. Burgess cannot exempt itself from the strictures of 30 CFR 715.16 in such an unaided manner. *See Carbon Fuel Co., supra; Alabama By-Products Corp., supra.*

The remaining question is whether sufficient evidence was presented to permit the ALJ to find as he did. The rules of procedure that govern this action provide that OSM has the initial burden of going forward to establish a prima facie case, but that the ultimate burden of persuasion shall rest with the applicant for review (Burgess). 43 CFR 4.1171. We have stated that such a prima facie case is made where sufficient evidence is presented to establish essential facts

[5] Burgess completed its brief on Aug. 31, 1979. *Alabama By-Products* was decided on Sept. 14, 1979, and *Carbon Fuel* on Sept. 25, 1979. Consequently, there is no discussion of these cases in that brief and Burgess did not request permission to file a supplemental brief.

which, if uncontradicted, will permit if not compel a finding in favor of OSM. *James Moore*, 1 IBSMA 216, 223, 86 I.D. 369, 373 (1979). The ALJ found a prima facie showing of violation in the testimony of an OSM inspector who recounted statements, damaging to Burgess, made by a Burgess superintendent during the inspection tour. More specifically, the ALJ found that the superintendent said that topsoil had not been saved during a period when the regulation would require such saving (Decision at 3). Burgess maintains on appeal that the inspector was not competent to make declarations that would bind Burgess and that, even if he were competent to do so, he did not in fact make them. The record does not support either contention.

At the very outset of the hearing Burgess indicated its understanding of the need for OSM to establish a prima facie case. It even announced it was so sure that OSM could not make one that it would "make an appropriate motion" at the proper time (Tr. 6). No motion for dismissal was made at the conclusion of OSM's case or at any other time during the hearing. Moreover, although the record is replete with objections made by Burgess to a variety of questions, none was made to the inspector's account of what the superintendent had allegedly told him about Burgess' improper topsoil removal practices. Nor did Burgess, while the inspector was recounting the conversation, request *voir dire* in order to cast doubt upon either the substance of the conversation or the "superintendent's" competency to bind the company by his statements.[6] There was no cross-examination to serve this purpose, nor did Burgess call any witnesses to challenge either the inspector's account of the conversation or the superintendent's competency to speak for Burgess.[7] The conclusions made by the ALJ were warranted under the circumstances.

[2] With respect to the perimeter markers violation, the interim regulations provide that "[t]he perimeter of the permit area" shall be clearly marked. 30 CFR 715.12(c). Unfortunately, there is no definition in those regulations of "permit areas."[8] The statute does define permit area as: "[T]he area of land * * * which * * * shall be covered by the operator's bond as required by sec. 1259 * * *." 30 U.S.C. § 1291(17) (Supp. I 1977). However, sec. 1259 relates to performance bonds and as such is only

[6] On appeal, Burgess questioned the propriety of the use of such "hearsay" testimony. However, a statement by a representative of a party that constitutes an admission is not hearsay in a Federal proceeding. *See, e.g., Fed. R. Evid.* 801(d). Moreover, an administrative tribunal is not necessarily forbidden to use hearsay evidence. *See* 5 U.S.C. § 556(d) (1976); *Richardson* v. *Perales*, 402 U.S. 389 (1970); *School Board of Broward County, Florida* v. *HEW, United States Office of Education*, 525 F.2d 900 (5th Cir. 1976).

[7] *See, e.g., Midland Enterprises, Inc.* v. *Notre Dame Fleeting & Towing Service, Inc.* 538 F.2d 1356 (8th Cir. 1976); Dow Chemical Co. (*U.K.*) v. *S. S. Giovannella D'Amico*, 297 F. Supp. 699 (S.D. N.Y. 1969).

[8] While "permit area" is defined in the permanent program regulations (30 CFR 701.5, 44 FR 15320 (Mar. 13, 1979)), those regulations are not applicable to enforcement actions during the interim program.

applicable to the permanent regulatory program. *See* 30 CFR Part 800, 44 FR 15385 (Mar. 13, 1979) (general bonding requirements under the permanent regulatory program). Therefore, the statutory definition of "permit area" is not directly applicable to the interim regulatory program.

The ALJ found that only 75 of the approximately 840 acres covered by Burgess' state permit were to be mined currently and that those were covered by bond (Decision at 3–4). He held that only that bonded area is required to be marked under 30 CFR 715.12(c) (*Id.*). Since "permit area" is not defined for purposes of the interim regulatory program, and the ALJ's holding is consonant with the spirit and purposes of the Act, we are in agreement with that holding.

[3] Marking the perimeter of the permit area, however, is only part of the task. It "shall be *clearly* marked by *durable* and easily *recognized* markers, or by other means approved by the regulatory authority" (italics supplied) (30 CFR 715.12(c)). There is no suggestion that the regulatory authority approved any other means, and the ALJ found that there was a congeries of various colored flags whose meanings were not clear to anyone (Decision at 4). Although Burgess concedes that no specific question and answer occurred at the hearing to indicate that an explanatory color key was available, it maintains that such was inferentially obtainable from the testimony (Appellant's Brief at 13, 14). The ALJ declined to make such an inference and we decline to say he was incorrect. The ALJ was entirely warranted to hold that the markings did not comply with the clarity and recognition requirements of 30 CFR 715.12(c).

The decision of the Hearings Division is affirmed.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

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